In addition to these common-law claims, MedVal alleged that MemberWorks had violated CUTPA, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." CONN. GEN. STAT. § 42-110b. CUTPA provides a private right of action for persons who have suffered an "ascertainable loss" because of such conduct. *Id.* § 42-110g(a). In addition to compensatory damages and attorneys' fees, the statute provides that a court (though not a jury) may award punitive damages to a victorious CUTPA plaintiff. *Id.* In certain circumstances, CUTPA also provides for a civil penalty of up to $5000 per willful violation, payable to the State. *Id.* § 42-110o(b).

MemberWorks denied liability, and the parties presented evidence to a three-member arbitration panel. On December 13, 2002, the panel issued an award finding for MedVal on all counts. The award listed various acts by MemberWorks that the panel characterized as "illustrative of [MemberWorks'] unfair and deceptive behavior," App. at 80a, including misrepresenting its contractual obligations and failing to make required disclosures of information to MedVal. The list also included less consequential acts, such as insisting on written communications and preparing an inaccurate summary of a meeting. *See* App. at 80a-81a (full text of award).

While the panel found for MedVal on liability, it awarded MedVal no compensatory damages, concluding that MedVal had not established the fact of its damages "with reasonable certainty." App. at 79a. Despite this finding, the panel awarded MedVal $5,000,000 in punitive damages on its CUTPA claim, as well as attorneys' fees and costs. App. at 82a.

### C. Judicial Proceedings

On December 18, 2002, MedVal filed a motion to confirm the arbitrators' award in Connecticut Superior Court under Connecticut's arbitration statute, which allows parties to convert arbitration awards into court judgments enforceable by the State. *See* CONN. GEN. STAT.

§ 52-417. The law further provides that the resulting judgment "shall have the same force and effect in all respects as, and be subject to all the provisions of law relating to, a judgment or decree in a civil action; and it may be enforced as if it had been rendered in a civil action." *Id.* § 52-421(b). Like similar laws in other states, the statute specifies certain narrow standards – such as requiring that the arbitrators act within the scope of their authority and free from bias – that must be met before a court can convert an arbitral award into an enforceable judgment. *See id.* § 52-418(a).

In addition, Connecticut requires that reviewing courts exercise *de novo* review to determine whether an arbitral award violates clearly established public policies of the State. *See Schoonmaker v. Cummings & Lockwood of Conn., P.C.*, 747 A.2d 1017, 1025 (Conn. 2000). In conducting this review, "the court is not concerned with the correctness of the arbitrator's decision but with the *lawfulness of enforcing* the award." *State v. New England Health Care Employees Union, Dist. 1199*, 855 A.2d 964, 970 (Conn. 2004) (emphasis added); *see id.* ("[T]he parties cannot expect an arbitration award approving conduct which is . . . contrary to public policy to receive judicial endorsement . . . .").

MemberWorks opposed MedVal's motion to confirm and moved to vacate the award. MemberWorks argued that the award violated a longstanding Connecticut public policy against excessive punitive damages. MemberWorks also argued that the substantive due process limits on punitive damages articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), applied because judicial review and confirmation of the award implicated the Fourteenth Amendment of the U.S. Constitution. MemberWorks argued that, under *Gore*, the punitive damages award was grossly excessive in light of the absence of any compensatory damages, CUTPA's $5000 civil penalty, and the low degree of reprehensibility in MemberWorks' conduct in a contract dispute between two businesses. On May 22, 2003, the Superior Court rejected these

arguments and entered judgment for MedVal confirming the award. App. at 57a-78a.

On appeal, the Connecticut Supreme Court affirmed. It rejected MemberWorks' state public policy arguments and held, as a matter of federal constitutional law, that it had no power to review an arbitral award of punitive damages under *Gore*. It specifically concluded that "an arbitration panel's award of punitive damages does not implicate the due process clause, *regardless of how excessive the award may be*." App. at 7a (emphasis added).[3] The dissent noted that, under the court's analysis, even an arbitral award of $5 *billion* in punitive damages, with no compensatory damages, "would be immune from judicial review." App. at 48a (Zarella, J., dissenting).[4]

MemberWorks had argued that the trial court's review of the award for consistency with state statutory requirements and public policy, and its entry of judgment upon the award, constituted state action. The Connecticut Supreme Court, however, rested its constitutional analysis on the conclusion that the arbitral award *itself* was not state action (a proposition MemberWorks did not dispute) and that "the act of the Superior Court in confirming the arbitration award did not convert the arbitration award into state action." App. at 9a. In reaching this conclusion, the court considered whether the arbitrators' award was "'aggravated in a unique way by the incidents of governmental authority.'" *Id.* (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991)). The

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[3] The court rejected MedVal's position that MemberWorks had waived its due-process challenge by not making this argument to the arbitrators. It held that, because MemberWorks' argument was based on judicial confirmation of the arbitral award rather than the award itself, MemberWorks could not have raised this issue in the arbitration. App. at 7a n.7.

[4] The dissent agreed with the majority's rejection of MemberWorks' federal constitutional arguments, App. at 36a, but would have held that the State's own public policy incorporates the due process standards articulated in *Gore* and bars excessive arbitral punitive damages awards. App. at 45a-55a.

court analogized the case to *Shelley v. Kraemer*, 334 U.S. 1 (1948), which held that judicial enforcement of racially restrictive covenants was state action, but noted that *Shelley* has largely been limited to its facts. It declined to adopt a similar holding in the context of judicial enforcement of arbitral awards. App. at 18a.

The court concluded by noting that other courts have held "[a]*lmost* universally" that judicial confirmation of an arbitral award does not convert the award into state action. *Id.* (emphasis added) (citing, among other cases, *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995)). The court recognized that some federal courts have criticized this view, App. at 19a-20a (citing *Commonwealth Assocs. v. Letsos*, 40 F. Supp. 2d 170, 177 n.37 (S.D.N.Y. 1999); *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821, 840-41 (Bankr. N.D. Ala. 1999)), and noted a recent Alabama Supreme Court decision holding that judicial confirmation of an arbitration award is state action, App. at 20a (citing *Birmingham News Co. v. Horn*, 901 So. 2d 27, 66-67 (Ala. 2004)). Despite these authorities urging or adopting the contrary view, the Connecticut Supreme Court sided with the Eleventh Circuit's ruling in *Davis*. The court thus found that it had no power to review the $5 million punitive damages award for excessiveness under the Constitution and affirmed the trial court's judgment.

## REASONS FOR GRANTING THE WRIT

This Court has long recognized a strong federal public policy supporting arbitration as a means for parties to avoid the risks, expenses, and procedural complexity of traditional litigation. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). The Court has extended this policy to allow parties to arbitrate claims potentially giving rise to punitive damages, provided the parties included such claims within the scope of their agreement to arbitrate. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995). At the same time, the Court has recognized an equally strong constitutional policy, embodied in the Due Process Clause, that protects litigants from grossly excessive awards of

punitive damages, which by their nature "further[] no legitimate purpose and constitute[] an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

This case stands at the intersection of these two lines of authority, where, in the absence of this Court's guidance, state and lower federal courts have struggled to reconcile these principles. Some courts have followed the approach taken by the Connecticut court, holding that the Due Process Clause simply does not apply to an arbitral award of punitive damages even where a court must, under state law, review the award on other grounds before converting it into an enforceable judgment. Under this approach, the courts may uphold a punitive damages award "regardless of how excessive the award may be." App. at 7a. The Alabama Supreme Court has taken the contrary approach, holding that judicial confirmation of an arbitral award is state action that must respect constitutional limits on punitive damages. Still other courts, though agreeing with Connecticut that due process limits do not apply to judicially confirmed awards, have nevertheless sought to import the *Gore* factors by other means. The result is confusion among the lower courts and litigants in an area of the law – arbitration – that is vital to the efficient resolution of disputes.

Moreover, the Connecticut court's decision, while purporting to favor arbitration by limiting judicial review, in fact does just the opposite. If adopted, its approach will have a profoundly negative effect on arbitration nationwide. Businesses and other parties vulnerable to excessive punitive damages awards will either avoid arbitration in favor of litigation in the courts, or they will attempt to exclude punitive damages from arbitration, leaving injured plaintiffs without an important remedy or requiring them to initiate court proceedings to recover those damages. The Connecticut decision, if allowed to stand and followed elsewhere, will also undermine the public policies embodied in statutes like CUTPA, which seek to deter conduct detrimental to the public. This Court's resolution

of the confused responses to the question presented is necessary to vindicate these policies.

Finally, the Connecticut decision departs from decades of precedents from this Court demonstrating that the operation of state courts *is* state action, even when that machinery is used only for issuing process and rendering judgments for private disputes. The state's involvement is far more intense in the context of judicial confirmation of arbitral awards, where – in Connecticut and other states – the courts review awards for consistency with statutory standards and state public policies. The net result of the Connecticut approach is that state courts must review arbitral awards for violations of state public policy, but cannot review them for violations of the federal constitutional policy barring the imposition of grossly excessive punitive damages. Given that punitive damages claims are and should remain arbitrable, the Court should review this decision to vindicate this constitutional principle.

## I. The Connecticut Decision Highlights the Conflict and Confusion in the Courts Regarding Due Process Limits on Judicial Confirmation of Arbitral Punitive Damages Awards.

This Court has clearly and repeatedly held that the Due Process Clause imposes a "substantive limit on the size of punitive damages awards." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). Although the Court's reasoning logically should apply to *any* court judgment enforcing a punitive damages award, the Court has yet to pass on the due process implications of entry of judgment upon an arbitral award of punitive damages. The Connecticut decision is the latest in a series of conflicting, confusing court rulings on this important issue, making the question presented ripe for review.

**A.** With its decision, the Connecticut Supreme Court has joined other jurisdictions, chief among them the Eleventh Circuit, in holding that excessive arbitral awards of punitive damages are subject to no due process constraints whatsoever. In *Davis v. Prudential Securities, Inc.*, *supra*,

the Eleventh Circuit upheld the confirmation of an arbitral award of $483,684 in compensatory damages and $300,000 in punitive damages. In response to Prudential's argument that the district court's confirmation of the award was unconstitutional, the Eleventh Circuit held that there could be no due process claim regarding the arbitral award itself, *see* 59 F.3d at 1191, and that "the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause," *id.* at 1192.

*Davis* is the only federal court of appeals to address this question squarely in the context of punitive damages. The *Davis* approach is reflected in rulings in federal district courts and intermediate state courts refusing to subject arbitral awards to due process review, though those courts often erroneously focus on the underlying arbitration and not judicial confirmation of the award. *See Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 208 (S.D.N.Y. 2002) ("The arbitrators are private actors, and their directives are not subject to the Due Process Clauses . . . ."); *Sanders v. Gardner*, 7 F. Supp. 2d 151, 174 (E.D.N.Y. 1998) (citing *Davis*); *Porush v. Lemire*, 6 F. Supp. 2d 178, 186 (E.D.N.Y. 1998) (same); *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 734 (N.D. Tex. 1997) (same); *Rifkind & Sterling, Inc. v. Rifkind*, 33 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 1994) (holding that the "limited degree of state action" in judicial confirmation of an arbitral award does not implicate substantive due process limits on punitive damages).

**B.** The Alabama Supreme Court's 2004 decision in *Birmingham News Co. v. Horn*, *supra*, subjecting an arbitral punitive damages award to due process review, is directly contrary to *Davis* and the ruling in this case. In *Horn*, newspaper dealers brought claims against the newspaper for wrongfully and fraudulently terminating their dealer agreements, all of which contained arbitration clauses. After a state court compelled arbitration and the dealers prevailed on the merits, the arbitral panel awarded damages totaling some $20 million, including $14 million in punitive damages. *See Horn*, 901 So. 2d at

39-40. The newspaper moved to vacate the award in state court, arguing, among other things, that the punitive damages award violated its due process rights.

The Alabama Supreme Court rejected the plaintiffs' argument that the Due Process Clause did not apply. *See id.* at 66. The court declined to follow *Davis*, noting that it "has been criticized by legal commentators." *Id.*[5] Thus, the court held that the newspaper's appeals "are appeals from *the circuit court judgments of confirmation, not from the underlying awards.*" *Id.* (emphasis added). As a result, the court "readily perceive[d] the requisite state action underlying these appeals sufficient to justify our review of the awards under governing federal due-process considerations." *Id.* Although the court in *Horn* ultimately upheld the punitive damages award,[6] *Horn* presents a direct conflict with the ruling in this case and in *Davis* that due process limits on excessive punitive damages simply do not apply to judicially confirmed arbitral awards.

While no federal appellate court has expressly adopted the *Horn* approach, the Eighth Circuit implicitly accepted it in *Stark v. Sandberg, Phoenix & Von Gontard,*

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[5] The Alabama court sought to avoid a conflict by distinguishing *Davis* on the ground that, in *Horn* (unlike in *Davis*), a court had compelled arbitration in accordance with the parties' contracts, involving the State in the case before the award was issued. *See* 901 So. 2d at 66. But that is a distinction without a difference; it would make no sense for due process to apply to judicial confirmation of an arbitral award where a party had to be compelled to arbitrate, but not where the party voluntarily abided by its arbitration agreement. *Horn* holds that judicial confirmation is state action, thus placing Alabama directly at odds with Connecticut and the Eleventh Circuit.

[6] Having found state action sufficient to trigger the application of *Gore* and *State Farm*, the Alabama court reviewed the propriety of the arbitral awards. That review, however, was limited by the newspaper's submission, which argued only that the *arbitrators*, not the trial court, should have followed *Gore* in issuing the award. As a result, the court considered only whether the newspaper had identified a "manifest disregard by the panel of the law of punitive damages," and upheld the award because the newspaper could not show that the panel had ignored *Gore* and *State Farm*. *See id.* at 69.

*P.C.*, 381 F.3d 793 (8th Cir. 2004). There, defendant EMC Mortgage Corporation argued that the arbitrator had manifestly ignored the law embodied in *Gore* and *State Farm* in awarding the plaintiffs $6,000,000 in punitive damages and actual damages of only $2000. Accepting that framing of the question, which evaded the question of whether judicial confirmation (as opposed to arbitration itself) is state action, the court found that the arbitrators had not disregarded *Gore*. *See id.* at 802-03. This Court declined to review *Stark* last Term, *see EMC Mortgage Corp. v. Stark*, 125 S. Ct. 1973 (2005), but the petition for certiorari did not present the question at issue here.[7]

**C.** Even the courts that have accepted *Davis* have expressed considerable discomfort with its approach (and the approach of the Connecticut Supreme Court). In *Knepp*, *supra*, an Alabama federal bankruptcy court reluctantly followed *Davis*, but noted that on a clean slate it would side with commentary urging a different result: "It is not difficult to find state action in this case . . . . This Court believes the scholarly articles correctly address this issue." 229 B.R. at 841; *see id.* at 840-41 (citing Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 609 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 44 (1997)). Similarly, one district court has stated:

> [T]he Court respectfully doubts that the rationale for this result set forth in *Davis v. Prudential Secs., Inc.*, and *Sanders v. Gardner* – viz. that an

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[7] The principal question presented in the *Stark* petition was whether, by adopting an unforeseeable reading of state law, the Eighth Circuit had violated EMC's due process rights. A second question – whether an arbitrator manifestly disregards the law by imposing a punitive damages award that violates *Gore* – did not squarely raise the state action question posed in this petition. *See* Pet. for Cert. at i, *EMC Mortgage Corp. v. Stark* (No. 04-1056, Feb. 2, 2005), *cert. denied*, 125 S. Ct. 1973 (2005).

> arbitration award involves no state action – is well-founded. While the procedures utilized in private arbitration do not constitute state action, the application of the coercive power of a court to confirm and enforce an arbitration award is arguably another matter.

*Letsos*, 40 F. Supp. 2d at 177 n.37 (citations omitted).

Still other courts, believing they are promoting the public policy favoring arbitration, have declined to subject arbitral awards to due process review, but have been unable to live with the result accepted by the Connecticut court – a judiciary constitutionally powerless to review any punitive damages award, no matter how large. In *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003), for example, a New York appellate court confronted a judicially confirmed arbitral award of $27 million, including $25 million in punitive damages. The court noted "ample authority" that *Gore* did not apply to arbitral awards as a matter of constitutional law. *Id.* at 271. Clearly uncomfortable with allowing such a large award to pass unreviewed, the court nevertheless applied *Gore* as "a guide for determining whether such an award is irrational," *id.*, shoehorning *Gore* into a separate, extremely narrow ground for vacatur. The court then vacated the punitive damages award because it was grossly disproportionate to the defendant's conduct and to the civil penalties under the statute involved – which, as in this case, was CUTPA. *See id.* at 276.

The case law thus reflects a conflict on the question presented between the Connecticut decision in this case and the decisions of a federal court of appeals and the high court of another state – with confusion abounding in the lower courts. An arbitral award of punitive damages will receive considerably more constitutional scrutiny in an Alabama court than it will in Connecticut, even though it may result from an identical contract. Indeed, Alabama litigants will find their arbitral awards subject to different standards of review depending on whether they seek confirmation in federal or state court, given Alabama's location within the Eleventh Circuit. And in New York, a punitive damages

award may receive due process scrutiny masquerading as review under state-law standards proscribing "irrational" arbitral awards. MemberWorks respectfully urges the Court to resolve this important conflict.

## II. The Connecticut Decision Will Undermine This Court's Longstanding Support for Arbitration.

That federal due process review of arbitral awards of punitive damages now hinges on geography is reason enough for the Court to review the question presented. But the Court should also grant review to vindicate the important public policy favoring arbitration, which will suffer if the confusing state of the law remains unresolved.

**A.** This Court has long recognized a strong federal public policy supporting arbitration of civil disputes, *see Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), intended "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). As a result, in any case involving an arbitration agreement, "due regard must be given to the federal policy favoring arbitration." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

A refrain common to the jurisdictions siding with Connecticut is that applying due process limits to arbitral awards of punitive damages will have a deleterious effect on the arbitration. *See Rifkind*, 33 Cal. Rptr. 2d at 834. In fact, the reverse is true. If the Connecticut decision and similar rulings are allowed to stand, the law in some jurisdictions will compel review and reversal of grossly excessive punitive damages awards resulting from court proceedings but will expressly preclude review of an *identical* award resulting from arbitration. Many litigants will undoubtedly abandon the new uncertainties of arbitration for the constitutional limits on such unforeseeable exposure in

traditional litigation. The risks of litigation that arbitration once ameliorated, *see Keating*, 465 U.S. at 7, will pale in comparison to the prospect that, notwithstanding a plaintiff's inability to prove any actual harm, a defendant may be subjected to millions of dollars or more in punitive damages. The Connecticut ruling raises a red flag for anyone contemplating arbitration, undermining federal public policy.

**B.** The Connecticut Supreme Court, like the *Davis* court, attempted to minimize this concern by suggesting that parties wishing to avoid large arbitral awards of punitive damages can exclude punitive damages in their arbitration agreements. *See* App. at 24a n.14; *Davis*, 59 F.3d at 1193 n.6. As an initial matter, it is far from clear that the law would allow parties to exempt themselves by contract from penalties under statutes such as CUTPA. *See* App. at 50a n.8 (Zarella, J., dissenting); *Stark*, 381 F.3d at 800-02 (reinstating award of $6,000,000 in statutory punitive damages notwithstanding parties' express agreement that arbitrator could not award punitive damages). Given the risks involved in relying on such contractual exclusions,[8] businesses and other parties will opt for courtroom litigation, despite the time and expense involved.[9]

Moreover, to the extent litigants follow the Connecticut court's advice and "contract around" punitive damages, the effect will be to undermine both arbitration and the public policies expressed in statutes such as CUTPA.

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[8] *See Booker v. Robert Half Int'l, Inc.*, No. 04-7089, ___ F.3d ___, 2005 WL 1540796, at *6 (D.C. Cir. Jul. 1, 2005) (discussing federal caselaw invalidating arbitration agreements in their entirety due to invalid clauses purporting to exclude punitive damages for certain statutory causes of action).

[9] The Connecticut court also suggested, without analysis, that courts perhaps could vacate excessive punitive damages awards as biased or in manifest disregard of the law. App. at 31a n.15. But as the dissent noted, App. at 49a n.7, excessiveness is not the same as bias. And the extremely narrow manifest disregard standard requires that an arbitrator blatantly disregard *clearly established* law, yet the only law in Connecticut on this point – this case – holds that excessive punitive damages awards are *permitted*, not precluded.

These statutes – present in one form or another in virtually every state – exist to remedy, deter and punish unfair practices against consumers and businesses. *See, e.g., Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 120 (2d Cir. 2004) (noting that CUTPA bars practices that offend public policy, are immoral, unethical, oppressive or unscrupulous, or substantially injure consumers). By encouraging parties to exclude punitive damages from their arbitration agreements, these courts will lower the expected cost of behavior that state legislatures have found to violate public policy. Moreover, plaintiffs will undoubtedly seek to avoid arbitration clauses precluding punitive damages by suing first in court, either leading to litigation on the merits in court or, at a minimum, forcing litigation on a motion to compel arbitration. Other plaintiffs will try to initiate law suits in an effort to recover punitive damages after establishing liability in an arbitration. The net effect, again, will be to undermine arbitration as an efficient, effective alternative to litigation.

In this regard, it bears note that the "judicial hostility" to arbitration that Congress sought to combat, *Gilmer*, 500 U.S. at 24, derived in no small measure from the concern that powerful defendants would use arbitration to force plaintiffs into a less favorable forum. Yet by encouraging parties to contract around statutory provisions designed to punish bad acts, the confusion embodied in the Connecticut decision threatens to make reality what was once only a misplaced fear. Nothing would be more detrimental to arbitration.

**C.** Allowing courts to review excessive punitive damages awards issued by arbitrators will not threaten to constitutionalize all aspects of arbitration, as some have contended. *See, e.g., Rifkind*, 33 Cal. Rptr. 2d at 834. Private voluntary arbitration, without more, is not state action, and the question presented here does not call that uncontested principle into doubt. Parties may willingly contract for an arbitration hearing involving more or less process than is constitutionally required in a state court proceeding. *See Volt*, 489 U.S. at 479 ("Just as [parties] may limit by contract the issues which they will arbitrate,

so too may they specify by contract the rules under which that arbitration will be conducted.") (citation omitted); *see also FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (private arbitration proceedings not subject to procedural due process claims); *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986) (same)). Judicial enforcement of arbitration contracts passes constitutional muster, notwithstanding the procedural "shortcomings" in arbitration, because the courts are simply enforcing the parties' agreement to resolve their dispute before a private decision-maker not bound by the state's procedural rules. *See Volt*, 489 U.S. at 479.

*Gore* and *State Farm*, on the other hand, are not procedural restrictions on arbitrators but rather *substantive* limits on punitive remedies that the state can enforce, regardless of their derivation. *See Oberg*, 512 U.S. at 420 ("[T]he Constitution imposes a substantive limit on the size of punitive damages awards."). That constitutional limit is based on the public purpose of punitive damages, a penalty imposed to serve the State's interest, *see infra* Part III.C, and it has no bearing on any other aspects of the arbitral process. In choosing to resolve their disputes in arbitration rather than in court, parties do not give up their substantive statutory rights, *see Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987), and it makes even less sense to deprive them of their substantive constitutional rights.

This case thus does not test whether arbitration procedures are subject to constitutional requirements; it tests whether the *State* can use its coercive power to enforce an arbitral award that is so excessive that it constitutes an arbitrary deprivation of property. *See State Farm*, 538 U.S. at 417. The question presented is thus substantive and narrow. It does not pose risks to the procedural distinctiveness of arbitration that makes it an effective mechanism for resolving disputes.

## III. The Connecticut Decision Undermines This Court's Precedents on Punitive Damages by Erroneously Holding That Entry of Judgment on an Arbitral Award Is Not State Action.

Finally, the Court should review the question presented because the Connecticut decision departs from decades of precedent holding that the operation of judicial machinery *is* state action. In Connecticut, as in any state that subjects arbitral awards to judicial review for consistency with public policy, the State's involvement is even clearer. By immunizing these state court judgments, but not judgments enforcing punitive damages awarded by juries or judges, from due process review, the Connecticut decision erroneously creates a division in the law that will undermine this Court's holding that state punitive damages judgments must satisfy substantive limits under the Due Process Clause.

**A.** Under *Gore*, no court could have imposed the punitive damages award in this case if it had resulted from a trial. *First*, the award is grossly disproportionate to MemberWorks' conduct. In *Gore*, the Court vacated a $2 million punitive damages award where the harm from BMW's conduct was "purely economic in nature," "evinced no indifference to or reckless disregard for the health and safety of others," and did not result from a pattern of knowingly illegal conduct. 517 U.S. at 575-80. The same considerations apply to the purely commercial dispute here. *Second*, the arbitral award is clearly excessive given the absence of actual, compensable harm to MedVal. *See id.* at 580 (requiring reasonable ratio of punitive damages to actual damages). While the Court has declined to establish a bright-line ratio, it has stated that a ratio beyond single digits is constitutionally suspect. *See State Farm*, 538 U.S. at 424-25. Here, where MedVal suffered no actual or even "potential" harm, *see TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993), the ratio of $5,000,000 to $0 is grossly excessive. *Third*, CUTPA's civil penalty of up to $5000 per willful violation in no way provided notice to MemberWorks of the prospect

of a $5 million punitive damages award against it. *See* CONN. GEN. STAT. § 42-110o(b); *Gore*, 517 U.S. at 583-85.[10]

Under every *Gore* factor, the award was excessive – yet, the Connecticut Supreme Court did not even reach this question, finding it irrelevant to judicial confirmation. Under the court's decision, therefore, Connecticut courts must convert into state court judgments punitive damages awards that would unquestionably violate the Constitution had they not been issued in arbitration – and they must do so, in the words of the court, "regardless of how excessive the award may be." App. at 7a.

**B.** The Connecticut court framed the question before it as whether the arbitral award was state action. *See* App. at 9a (citing *Edmonson*, 500 U.S. at 621-22). But just like a jury verdict, an arbitral award acquires practical consequences only when it is entered as a judgment – that is, when a court, pursuant to state law, enables the coercive apparatus of the State to enforce the award. *See* CONN. GEN. STAT. §§ 52-417, -421. The judgment, not the award, triggers the constitutional obligation of full faith and credit. *See McDonald v. City of West Branch*, 466 U.S. 284, 287-88 (1984).

This Court has repeatedly held that a judicial entry of judgment is state action subject to the Due Process Clause. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that judicial enforcement of a defamation claim was state action that implicated the Constitution. Contrary to the Connecticut court's (and *Davis*'s) characterization of the entry of judgment as a *de minimis* act by the state, *Sullivan* stated that "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.* at 265; *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 668

[10] In addition, court awards of punitive damages under CUTPA "traditionally have been modest," App. at 44a (Zarella, J., dissenting), and no court has issued an award even remotely approaching the award in this case in circumstances where a plaintiff has suffered no compensable harm. Past awards therefore provided no notice of MemberWorks' possible exposure to a $5 million punishment in the absence of compensable harm to MedVal.

(1991) (enforcement of promissory estoppel was state action because the doctrine's "legal obligations would be enforced through the official power of the courts"). Moreover, the Court has specifically held that judicial action to deprive property – precisely what MedVal's confirmed arbitral award represents – is state action even when the court's involvement is only ministerial. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (issuance of a prejudgment writ of attachment); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (issuing sequestration order upon seller's allegation); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (issuing writ of replevin executed by state agent upon private party's *ex parte* application); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (issuing summons in contract action).

Judgment confirming an arbitral award, however, is far more than a ministerial act of the State. Under Connecticut law, courts must ensure consistency with standards specified by statute and with the State's public policies. In Connecticut, successful arbitration plaintiffs do not simply register their awards with the State. Like similar laws in other states, Connecticut's arbitration statute requires the reviewing court, for example, to determine whether the arbitrators acted within their contractual authority and without bias. *See* CONN. GEN. STAT. § 52-418; *accord, e.g.*, CAL. CIV. PROC. CODE § 1286.2; N.Y. C.P.L.R. 7511(b). While these standards are narrow, they represent clear legislative judgments regarding the propriety of enforcing arbitral awards, and the courts act as the State in implementing those standards.

Connecticut, again like other states, further requires that a reviewing court satisfy itself that an arbitral award is consistent with the State's clearly established public policies. *See Schoonmaker*, 747 A.2d at 1025; *see also, e.g.*, *Sawtelle*, 754 N.Y.S.2d at 274; *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 239 (Tex. 2002); *AFSCME v. Dep't of Central Mgmt. Servs.*, 671 N.E.2d 668, 673 (Ill. 1996). A Connecticut court is thus expressly ruling upon the *lawfulness*, as measured by state public policy, of enforcing an arbitral award. *See New England Health Care Employees Union*, 855 A.2d at 970. While the public-policy ground for vacatur

is narrow, it is a meaningful and essential government function for ensuring the legality of arbitration results. Indeed, judicial review of arbitral awards is such an important safeguard that, as a matter of law, the parties cannot agree by contract to eliminate it from a confirmation proceeding. *See Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003) (parties cannot preclude "manifest disregard" review of arbitral award). In *Hoeft*, the Second Circuit stated that "federal courts are not rubber stamps," *id.*, an observation that applies equally, if not more so, to state courts conducting *de novo* public policy review of arbitral awards. And given that "manifest disregard" operates as a safety net below which reviewing courts cannot go, it makes even less sense to preclude courts from considering the minimal constitutional standards announced by this Court.

**C.** The effect of the Connecticut decision will be to immunize grossly excessive arbitral awards of punitive damages from judicial review. The magnitude of this error should not be underestimated. Unlike contract remedies, which aim to make the parties whole and benefit only the litigants, statutory punitive damages like those under CUTPA aim to safeguard the *public interest* as defined by the State. *See Gore*, 517 U.S. at 568; *Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370, 373 (Conn. 1992) ("'[T]he purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff.'") (quoting Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 292 (1983)); *Lenz v. CNA Assurance Co.*, 630 A.2d 1082, 1083 (Conn. Super. Ct. 1993) ("[CUTPA] allows for punitive damages based on a theory of *deterrence*, whereas the common law premise of such an award is *compensation*."). While the parties may empower an arbitrator to determine the punishment, *see Mastrobuono*, 514 U.S. at 58, punitive damages still derive from a public right. Thus, judicial confirmation of punitive damages in an arbitral award would constitute state action even if confirmation of an arbitral award in general did not.

It is precisely because of this public, noncompensatory aspect of punitive damages that this Court has imposed substantive due process limits to bar arbitrary and irrational

awards. *See State Farm*, 538 U.S. at 417 ("To the extent [a punitive damages] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."). Judicial review of punitive damages awards is thus necessary to safeguard these due process rights when the state enters a judgment imposing a penalty in the public's name. *See Oberg*, 512 U.S. at 421. By walling off judicially confirmed arbitral awards of punitive damages from due process review, the Connecticut decision undermines this principle and leads to two anomalous results. First, Connecticut courts still must review arbitral awards for consistency with state public policies, but are now barred from considering federal *constitutional* policies. Second, the Constitution will still prevent a Connecticut judge from imposing grossly excessive punitive damages following a CUTPA trial, but, as read by the Connecticut Supreme Court, will require the same judge to confirm an identical award following a CUTPA arbitration.

## CONCLUSION

The authorities reflect a fundamental disagreement on how to resolve the question presented by this petition. To bring certainty to this issue of importance to litigants nationwide, and to protect the Court's carefully considered due process and arbitration jurisprudence, the Court should grant the petition.

Respectfully submitted,

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July 20, 2005

273 Conn. 634

SUPREME COURT OF CONNECTICUT

MEDVALUSA HEALTH PROGRAMS, INC. *v.*
MEMBERWORKS, INC.
(SC 17116)
(SC 17117)

Sullivan, C.J., and Borden, Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.

Argued October 27, 2004 – officially released May 17, 2005

*Procedural History*

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of Hartford, where the defendant filed a motion to vacate the award; thereafter, the matter was tried to the court, *Berger, J.*; judgment granting the application to confirm and denying the motion to vacate; subsequently, the court denied the plaintiff's motion for prejudgment and post-judgment interest and its motion to open the judgment with respect to postjudgment interest, and the plaintiff and the defendant filed separate appeals. *Affirmed.*

*Barbara S. Miller* and *Robert A. Harris* for the appellant in Docket No. SC 17116, appellee in Docket No. SC 17117 (plaintiff).

*Aaron S. Bayer* and *Jonathan M. Freiman*, with whom were *Jeffrey R. Babbin, Kevin M. Smith* and, on the brief, *Robert M. Langer, Kevin M. Kennedy* and *Steven B. Malech*, for the appellee in Docket No. SC 17116, appellant in Docket No. SC 17117 (defendant).

*Opinion*

BORDEN, J. This case involves two separate appeals.[1] In the first appeal, the defendant, MemberWorks, Inc., appeals from the judgment of the Superior Court confirming an arbitration award in favor of the plaintiff, MedValUSA Health Programs, Inc., awarding the plaintiff no compensatory damages and $5 million in punitive damages. The defendant claims on appeal that the trial court's confirmation of the arbitration award violated its right to due process under the fourteenth amendment of the United States constitution and violated the state's public policy against excessive punitive damage awards. In the second appeal, the plaintiff appeals from the judgment of the Superior Court denying the plaintiff prejudgment and postjudgment interest on the arbitration award. On appeal, the plaintiff claims that the trial court's decision was an abuse of discretion. We disagree with the claims advanced by both the defendant and the plaintiff in their respective appeals and, accordingly, we affirm the judgment of the Superior Court.

The record reveals the following facts and procedural background. The plaintiff is a Connecticut corporation formed by Andrew Bronfman and Andrew Fineberg to sell discount health care subscriptions for physician, dental, vision, prescription, hearing and other medically-related services to targeted segments of the general public. The

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[1] In the first case, SC 17117, the defendant, MemberWorks, Inc., appealed from the judgment of the trial court to the Appellate Court. In the second case, SC 17116, the plaintiff, MedValUSA Health Programs, Inc., appealed from the judgment of the trial court to the Appellate Court. We transferred both appeals to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199(c).

defendant is a Connecticut corporation that provides membership service programs that give consumers access to discounts on a variety of products and services in many areas, including the health care industry. The parties entered into a contract whereby the plaintiff agreed to become a wholesale, nationwide vendor of one of the defendant's dental and health plans. After they entered into the contract, relations between the parties deteriorated, prompting them to amend their agreement on April 15, 1999. The amended contract delayed the "start date"[2] of the agreement and reduced the number of service units that the plaintiff was obligated to purchase within eighteen months of the start date. The amendment also changed the defendant's obligations relating to the number and density of physicians participating in the program by supplementing the original provider network (network 1) made available to the plaintiff with a second provider network (network 2), to which the plaintiff would have access when network 1 provided insufficient coverage within a state. The parties' relationship did not improve and, eventually, the plaintiff notified the defendant that it was shutting down its business operations and "evaluating [its] options with counsel." Subsequently, the plaintiff filed a demand for arbitration with the American Arbitration Association for breach of contract, breach of the implied covenant of good faith and fair dealing, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The demand alleged that the defendant had breached the original and

[2] The "start date" is defined in the parties' contract as "the date that all fulfillment materials and services are readily available so that [the plaintiff] can commence its business operations hereunder."

amended agreements by: (1) failing to communicate to the plaintiff vital information regarding the provider networks; (2) failing to ensure that the provider networks were sufficient to service the needs of the plaintiff's customers; (3) making misrepresentations about the number and distribution of physicians in network 1 and about the admitting privileges of network 2 physicians to network 1 hospitals;[3] (4) withdrawing the dental network; (5) failing to deliver fulfillment materials;[4] (6) refusing the plaintiff's requests for meetings; and (7) refusing to communicate with the plaintiff other than in writing. The plaintiff further alleged that the defendant employed these tactics for the purpose of gaining a competitive edge over the plaintiff, and that the defendant began, at a time not specified in the demand, offering to the general public membership programs modeled after that designed by the plaintiff.

The arbitration panel ruled in favor of the plaintiff on all counts, but awarded no compensatory damages, finding that the plaintiff had failed to establish damages with reasonable certainty. The panel found, however, that, because the defendant had engaged in a number of unfair and deceptive acts in violation of CUTPA, General Statutes § 42-110g(a), the provision within CUTPA providing for the award of punitive damages, justified a punitive

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[3] Although network 1 included a hospital network, network 2 did not.

[4] The term "fulfillment materials" refers to the membership cards and booklets that would have been made available to the plaintiff's customers.

damages award of $5 million.[5] The defendant's unfair and deceptive acts, as found by the panel, may be summarized as follows: (1) the failure to disclose to the plaintiff the nature of its communications with network 1, some of which called into question the availability of that network for the plaintiff's enterprise; (2) the failure to disclose to the plaintiff the availability of other networks; (3) a history of misrepresenting its obligations to the plaintiff under the contract; (4) the refusal to meet with the plaintiff in a timely manner and the unavailability of one of its employees for conference calls; (5) the failure to inform the plaintiff about the elimination of free dental services from the program and its inadequate responses to the plaintiff's requests for information, including inquiries concerning the dental services; (6) the failure to provide the plaintiff with new fulfillment materials necessitated by that elimination; (7) the failure to approve in a timely manner hospital lists for advertising; (8) an insistence that all communications with the plaintiff be in writing; and (9) the preparation and distribution of an inaccurate summary of a meeting with the plaintiff. In addition to punitive damages, the panel awarded the plaintiff $387,794 in attorney's fees and $70,950 in arbitration costs.

The plaintiff timely applied to the trial court to confirm the arbitration award.[6] Soon thereafter, the

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[5] General Statutes § 42-110g(a) provides in relevant part: "The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper."

[6] General Statutes § 52-417 authorizes such a motion and provides in relevant part: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy

(Continued on following page)

defendant moved to vacate the award on three grounds: (1) the award violated Connecticut public policy, embodied in the due process clause of the fourteenth amendment of the constitution of the United States, against excessive punitive damage awards; (2) the award violated the public policy against awarding punitive damages in CUTPA actions in the absence of reckless, intentional or wanton misconduct; and (3) the excessive award evidenced a manifest disregard or patently irrational application of the law in violation of General Statutes § 52-418(a)(4). The court denied the defendant's motion to vacate and granted the plaintiff's application to confirm the arbitration award. Subsequently, in a separate ruling, the court denied the plaintiff's motion for prejudgment and postjudgment interest. These appeals followed. Further facts and procedural history will be set forth where necessary.

I

The defendant claims that the trial court improperly confirmed the arbitrator's award because the award of

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concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. . . ."

General Statutes § 52-421(b) establishes the effect of confirmation of an arbitration award, providing: "The judgment or decree confirming, modifying or correcting an award shall be docketed as if it were rendered in a civil action. The judgment or decree so entered shall have the same force and effect in all respects as, and be subject to all the provisions of law relating to, a judgment or decree in a civil action; and it may be enforced as if it had been rendered in a civil action in the court in which it is entered. When the award requires the performance of any other act than the payment of money, the court or judge entering the judgment or decree may direct the enforcement thereof in the manner provided by law for the enforcement of equitable decrees."

punitive damages was excessive: (1) in violation of the defendant's right to due process under the fourteenth amendment of the United States constitution; and (2) in violation of well-defined Connecticut public policy.[7] We disagree. We conclude that, because an arbitration award does not constitute state action and is not converted into state action by the trial court's confirmation of that award, an arbitration panel's award of punitive damages does not implicate the due process clause, regardless of how excessive the award may be. Furthermore, we conclude that, because Connecticut does not have a well-defined public policy against the award of excessive punitive damages, the award does not violate public policy.

A

We first address the defendant's claim that the arbitrator's award of punitive damages violated its right to due process because the award was excessive. See generally *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The constitutional

[7] The plaintiff argues that these claims are not properly before this court because the defendant failed to argue to the arbitration panel that the failure to award compensatory damages should place a limit on the amount of punitive damages that the panel could award. Regarding the defendant's public policy claim, however, we have already stated, in *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 430, 747 A.2d 1017 (2000), that "often the question of whether [an] award [violates public policy] will not arise until after the award has been rendered. . . . Thus, in such a case, there would be no reason to defer to the arbitrator regarding a question that might not have been considered in the arbitration proceeding." (Citations omitted.) As for the defendant's due process claim, because it is premised upon judicial confirmation of the arbitration award, the defendant could not have presented this claim to the arbitration panel. Therefore, both claims are properly before this court.

protections of individual rights and liberties extend only to government actions. *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 619, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991); see also L. Tribe, American Constitutional Law (2d Ed. 1988) § 18.1, p. 1688. Since the civil rights cases; see *United States* v. *Stanley,* 109 U.S. 3, 4, 3 S. Ct. 18, 27 L. Ed. 835 (1883); the United States Supreme Court has maintained that, against private conduct, "however discriminatory or wrongful ... the [f]ourteenth [a]mendment offers no shield." (Internal quotation marks omitted.) *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 349, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974). Therefore, in determining whether a claimant's due process rights have been violated, the threshold inquiry is whether the challenged conduct constitutes state action. This inquiry becomes quite complicated when, as in the present case, the actor is a private entity. See *Cremin* v. *Merrill Lynch Pierce Fenner & Smith, Inc.,* 957 F. Sup. 1460, 1468 (N.D. Ill. 1997) (citing cases). In such a case, the question becomes whether the conduct in question is "fairly attributable" to the state. *Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

The United States Supreme Court currently employs a two part test to determine whether the conduct of a private actor is fairly attributable to the state. "First, the deprivation must be caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the [s]tate or by a person for whom the [s]tate is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. In order to determine whether the actor is a state actor, the court must consider: "the extent to which the actor relies on governmental assistance and

benefits, see *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U.S. 478 [108 S. Ct. 1340, 99 L. Ed. 2d 565] (1988); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 [81 S. Ct. 856, 6 L. Ed. 2d 45] (1961); whether the actor is performing a traditional governmental function, see *Terry* v. *Adams,* 345 U.S. 461 [73 S. Ct. 809, 97 L. Ed. 1152] (1953); *Marsh* v. *Alabama,* 326 U.S. 501 [66 S. Ct. 276, 90 L. Ed. 265] (1946); cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm[ittee],* 483 U.S. 522 [544-45, 107 S. Ct. 2971, 97 L. Ed. 2d 427] (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see *Shelley* v. *Kraemer,* 334 U.S. 1 [68 S. Ct. 836, 92 L. Ed. 1161] (1948)." *Edmonson* v. *Leesville Concrete Co.,* supra, 500 U.S. 621-22. Applying these considerations to the present case, we conclude that the act of the Superior Court in confirming the arbitration award did not convert the arbitration award into state action.

The defendant does not argue that the arbitration panel relied on government assistance or benefits or performed a traditional governmental function. Indeed, we can find no instance in which a claimant has relied on a claimed dependence by an arbitration panel on government assistance and benefits, and federal courts have consistently rejected the "traditional government function" argument as support for concluding that an arbitrator was a state actor. See *Davis* v. *Prudential Securities, Inc.,* 59 F.3d 1186, 1191 (11th Cir. 1995) (collecting cases). Instead, the defendant argues that the Superior Court's confirmation of the award rendered the decision of the arbitration panel state action because, in the absence of the judicial action, the award would be unenforceable. Therefore, the only *Edmonson* factor relevant to the present case is

whether the judicial confirmation of the arbitration award constituted an incident of government authority that uniquely aggravated the defendant's claimed injury.

Because *Shelley* v. *Kraemer,* supra, 334 U.S. 1, is the principal case relied upon in any argument advocating that a private actor's conduct becomes state action based on the alleged aggravation of the claimed injury in a unique way by the incidents of governmental authority, it is helpful to review the factual and procedural background of that case.[8] *Shelley* involved a restrictive covenant, which was agreed to by white landowners, to exclude minorities from occupying any of the fifty-seven parcels of land that were subject to the covenant. Id., 4-5. The defendants in *Shelley* were persons of African-American descent who had purchased land from an owner of one of the subject parcels. Id., 5. The plaintiffs, owners of other parcels subject to the covenant, sued in state court, seeking a restraining order preventing the defendants from taking possession of the land and seeking judgment divesting title from the defendants and revesting title with the immediate grantor or some other person as directed by the court. Id., 6. The trial court denied the requested relief on the ground that the agreement had never become final and complete because it was the intention of the parties to the agreement that it was not to become effective until signed by all the property owners, a condition that had never been realized. Id. The Supreme Court of Missouri reversed the judgment of the trial court, and held that the restrictive

[8] *Shelley* actually involved two separate cases, the second of which involved facts that were not materially distinct from the first case. *Shelley* v. *Kraemer,* supra, 334 U.S. 6. For ease of reference, we set forth only the facts of the first case.

covenant was effective and did not violate any rights guaranteed to the defendants by the federal constitution. Id. The United States Supreme Court reversed, holding that judicial enforcement of a restrictive covenant constituted state action and that the covenant violated the defendants' rights under the equal protection clause of the fourteenth amendment. Id., 20. The court reasoned that the action of the judiciary was state action because "but for the active intervention of the state courts, supported by the full panoply of state power, [the defendants] would have been free to occupy the properties in question without restraint." Id., 19.

At first glance, judicial confirmation of an arbitration award fits the *Shelley* pattern perfectly. Judicial confirmation is indisputably an exercise of government authority. See id., 18 (actions of state courts and state officials are state action for purposes of fourteenth amendment). Furthermore, just as with the restrictive covenant in *Shelley,* the arbitration award at issue in the present case would have had no effect without the active intervention of the courts, "supported by the full panoply of state power . . . . " Id., 19. Therefore, the same "but for" reasoning that guided the analysis of the Supreme Court in *Shelley* would seem to compel the conclusion that the judicial confirmation of an arbitration award constitutes state action. *Shelley*'s precedential authority for this proposition, however, at least outside the context of racially restrictive covenants, is at best questionable. Although praised as a landmark civil rights decision,[9] *Shelley* has also been the

[9] S. Saxer, "*Shelley* v. *Kraemer*'s Fiftieth Anniversary: 'A Time for Keeping; a Time for Throwing Away?' " 47 U. Kan. L. Rev. 61, 83 (1998) (noting that "*Shelley* has been celebrated as an expansion of the state

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subject of much controversy and criticism.[10] Indeed, many commentators speculate that the holding of *Shelley* has

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action doctrine which allows private discrimination to be restricted by constitutional norms"); L. Henkin, "*Shelley* v. *Kraemer:* Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473 (1962) (noting that *Shelley* was "hailed as the promise of another new deal for the individual").

[10] S. Saxer, "*Shelley* v. *Kraemer*'s Fiftieth Anniversary: 'A Time for Keeping; a Time for Throwing Away?' " 47 U. Kan. L. Rev. 61, 83-84 (1998) (noting that *Shelley*'s expansion of state action doctrine has been criticized because of its potential to convert all private action to state action); see also P. Kurland, "The Supreme Court 1963 Term – Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 Harv. L. Rev. 143, 148 (1964) (referring to *Shelley* as "constitutional law's *Finnegan's Wake*"); L. Graglia, "State Action: Constitutional Phoenix," 67 Wash. U. L.Q. 777, 788 (1989) (describing reasoning in *Shelley* as "disconcerting because it illustrates with stark clarity both the [c]ourt's belief and the truth that it is exempt from any requirement that its opinions make sense"). Moreover, *Shelley*'s critics worry about the consequences should *Shelley*'s reasoning be extended. For example, Professor Lawrence Tribe has opined that *Shelley*'s reasoning, if "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." L. Tribe, supra, 1697. One author proposes the following hypothetical: "[N]eighbors, in the absence of zoning regulations, could not stop the operation of an adult bookstore or a nude dancing establishment in their community either through the use of private covenants or nuisance law because such activities would be protected by the [f]irst [a]mendment." S. Saxer, supra, 47 U. Kan. L. Rev. 65. Another commentator indicates that the flaw of *Shelley* is that it is grounded on a fundamentally paradoxical principle: "that the state may properly be charged with . . . discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make." L. Henkin, "*Shelley* v. *Kraemer:* Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473, 476 (1962). Finally, one author, in commenting on the expansive nature of *Shelley*'s conception of state action, notes that "*every* action engaged in by a private person is either compelled, prohibited, or permitted, i.e., authorized, by the legal system within which that person lives." (Emphasis added.) G. Buchanan, "A Conceptual History of the State Action Doctrine: The Search for

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been effectively confined to its facts. See, e.g., G. Buchanan, "A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part II)," 34 Hous. L. Rev. 665, 724 (1997).

A survey of subsequent United States Supreme Court cases that have discussed *Shelley* supports this conclusion. The court has criticized *Shelley* and expressed reservations about extending its holding, most expressly in *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 266, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993), a case in which abortion clinics and other groups sought to enjoin anti-abortion demonstrators from demonstrating at clinics in Washington, D.C. In responding to Justice Souter's concurring and dissenting opinion, the majority asserted that he had relied on *Shelley* for the proposition that during the sit-ins in the 1960's, "there *was*, even before the Civil Rights Act, legal warrant for the physical occupation." (Emphasis in original.) Id., 282 n.14. The majority then continued: "Any argument driven to reliance upon an extension of that volatile case is obviously in serious trouble." Id.

In addition to this direct criticism, the court's minimal reliance on *Shelley* as precedent evinces the court's reluctance to extend *Shelley*'s holding beyond the context of racial discrimination. Over the years, the Supreme Court has cited to *Shelley* primarily as a part of general language introducing the problem of state action, for the basic proposition that only state action is subject to fourteenth amendment strictures and that private action, no matter

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Governmental Responsibility (Part II)," 34 Hous. L. Rev. 665, 724 (1997).

how discriminatory, is not subject to constitutional scrutiny.[11] More extensive discussions of *Shelley* generally have appeared in concurring, rather than majority, opinions. For example, in *Lombard* v. *Louisiana,* 373 U.S. 267, 268, 83 S. Ct. 1122, 10 L. Ed. 2d 338 (1963), three African-American students and one white student, who were sitting at a whites only lunch counter at a privately owned restaurant in New Orleans, were asked to leave. When the students refused, they were arrested and subsequently convicted of criminal mischief. Id., 269. The students challenged their convictions as violative of the fourteenth amendment. Although there were no city ordinances requiring segregation, the majority opinion of the Supreme Court found the requisite state action in the actions of the city officials, who had issued statements establishing a local custom of segregation. Id., 270-73. After a similar occurrence had taken place in the city one week earlier, the mayor of New Orleans stated, four days prior to the defendants' arrest, that he had instructed the superintendent of police that no additional sit-ins would be "permitted." Id., 269. The majority opinion interpreted this statement and others as having a coercive effect on private individuals. Id., 272-73. In his concurrence, however, Justice Douglas focused on the imposition of criminal penalties on the defendants by the Louisiana judiciary. Id., 278. Justice Douglas relied on *Shelley* to conclude that, independent of any actions of the executive, the judiciary's

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[11] See, e.g., *Cuyahoga Falls* v. *Buckeye Community Hope Foundation,* 538 U.S. 188, 196, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003); *United States* v. *Morrison,* 529 U.S. 598, 621, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); *American Manufacturers Mutual Ins. Co.* v. *Sullivan,* 526 U.S. 40, 50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999).

actions in imposing the penalties constituted sufficient evidence of state action. Id.

In *Bell* v. *Maryland,* 378 U.S. 226, 227, 84 S. Ct. 1814, 12 L. Ed. 2d 822 (1964), demonstrators who engaged in a sit-in at a privately owned restaurant were arrested for trespass. The Maryland Court of Appeals affirmed the convictions, and the Supreme Court-granted certification. Id., 228. The Maryland legislature, however, subsequently passed a statute that made it unlawful for restaurants to deny service to a person because of his or her race. Id., 228-29. The majority, therefore, reversed the convictions and remanded the case to the Maryland Court of Appeals for consideration of whether the convictions should be nullified in light of the supervening change of law. Id., 228. Justice Douglas in his concurring opinion, however, would have reached the merits of the case. Id., 242. Admonishing the majority for leaving the "resolution of the conflict to others," Justice Douglas stated that "[t]he [c]ourt was created to sit in troubled times as well as in peaceful days." Id., 243 (Douglas, J., concurring). In concluding that the actions of the judiciary, as well as other Maryland state actors, formed a sufficient basis for a finding of state action, he first noted that judicial action alone had been considered sufficient for a finding of state action in "cases involving the use of coerced confessions (e.g., *Chambers* v. *Florida,* 309 U.S. 227 [60 S. Ct. 472, 84 L. Ed. 716 (1940)]), the denial to indigents of equal protection in judicial proceedings (e.g., *Griffin* v. *Illinois,* 351 U.S. 12 [76 S. Ct. 585, 100 L. Ed. 891 (1956)]), and the action of state courts in punishing for contempt by publication (e.g., *Bridges* v. *California,* 314 U.S. 252 [62 S. Ct. 190, 86 L. Ed. 192 (1941)])." *Bell* v. *Maryland,* supra, 257 (Douglas, J., concurring). In *Bell,* he said, "Maryland's action against these

Negroes was as authoritative as any case where the [s]tate in one way or another puts its full force behind a policy. The policy here was segregation in places of public accommodation; and Maryland enforced that policy with her police, her prosecutors, and her courts." Id. Likening the judicial action of the Maryland courts to that of the Missouri courts in *Shelley,* Justice Douglas asked, "Why should we refuse to let state courts enforce apartheid in residential areas of our cities but let state courts enforce apartheid in restaurants? If a court decree is state action in one case, it is in the other." Id., 259. He then added that the court should rely on *Shelley* in resolving the "restaurant cases," "holding that what the [f]ourteenth [a]mendment requires in restrictive covenant cases it also requires in restaurants." Id.

Only once has a majority opinion discussed *Shelley* at any length – in order to distinguish it. *Evans* v. *Abney,* 396 U.S. 435, 436, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970), arose from a trust, created in his will by Senator A.O. Bacon of Macon, Georgia, leaving land to the city for use as a whites only park. The city initially operated the park according to Senator Bacon's devise, but after the Supreme Court decision in *Brown* v. *Board of Education,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the city recognized that it could no longer constitutionally operate the park as segregated. *Evans* v. *Abney,* supra, 437. When the case came before the court for the first time, the city had been removed as a trustee and private trustees had been appointed. Id., 438. Nevertheless, in *Evans* v. *Newton,* 382 U.S. 296, 297-98, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), the court ruled that the park had to be treated as a public institution regardless of who held title, and on remand, the Supreme Court of Georgia held that the trust failed

because its purpose could no longer be fulfilled. *Evans* v. *Abney,* supra, 438-39. The Georgia court further concluded that the trust could not be saved by the doctrine of cy pres and that title in the land therefore reverted to the heirs. Id., 439. The petitioners, African-Americans who had intervened in the case, claimed that the decision of the state Supreme Court violated their rights to due process and equal protection under the fourteenth amendment. Id., 437. The Supreme Court affirmed the decision of the state court and concluded that there was no violation of the fourteenth amendment. Id., 446. In distinguishing this case from *Shelley,* the majority noted that "the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued." Id., 445. *Shelley,* on the other hand, involved "state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes." Id. By contrast, Justice Brennan in his dissent emphasized the similarity between *Evans* and *Shelley.* "[T]his is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of the Georgia courts thus, under *Shelley* v. *Kraemer* [supra, 334 U.S. 1, constitutes state action denying equal protection." *Evans* v. *Abney,* supra, 457 (Brennan, J., dissenting). Justice Brennan's dissent, contrasted with the majority's reasoning, further emphasizes the reluctance of the court to extend *Shelley* beyond the realm of restrictive covenants to apply to any and all private agreements that are dependent on court enforcement in order to be effective.

Our conclusion that Supreme Court case law does not support the extension of *Shelley* to the context of the judicial confirmation of an arbitration award is further supported by the various state and federal courts that have considered whether state action exists under such circumstances. Almost universally, courts have concluded that judicial confirmation of an arbitration award is not sufficient to convert the action of an arbitrator into state action. For example, the Seventh Circuit Court of Appeals found no state action in a case where the plaintiff claimed that her right to equal protection had been violated because her arbitration panel contained no women. The court noted that arbitration is a "private self-help remedy." *Smith* v. *American Arbitration Assn., Inc.*, 233 F.3d 502, 507 (7th Cir. 2000). Moreover, it reasoned, "[t]he fact that the courts enforce [arbitration] contracts, just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play. . . . This is not *Shelley* v. *Kraemer* [supra, 334 U.S. 1], or *Marsh* v. *Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), cases in which the enforcement of private contracts had the effect of establishing private governments exercising governmental power under delegation from the state." *Smith* v. *American Arbitration Assn., Inc.*, supra, 507. Similarly, the Eleventh Circuit Court of Appeals concluded in *Davis* v. *Prudential Securities, Inc.*, supra, 59 F.3d 1186, that judicial enforcement of an arbitration award did not convert the award into state action. In *Davis*, as in the present case, the defendant claimed that an arbitrator's award of punitive damages violated the defendant's right to due process and that the judicial confirmation of the award necessitated a finding of state action. Id., 1191. In rejecting the defendant's argument, the Eleventh Circuit noted that "the holding of

*Shelley* . . . has not been extended beyond the context of race discrimination." Id. In fact, the court reasoned, the Supreme Court had, since *Shelley,* narrowed the concept of state action, prompting other courts addressing the identical issue to decline to find state action based on *Shelley*'s reasoning. Id., 1192.

Other courts that have directly addressed this issue have arrived at the same conclusion. See, e.g., *Cremin* v. *Merrill Lynch Pierce Fenner & Smith, Inc.,* supra, 957 F. Sup. 1469 (court confirmation of arbitrators' decision was not state action); *United States* v. *American Society of Composers, Authors & Publishers,* 708 F. Sup. 95, 96-97 (S.D.N.Y. 1989) (mere court approval of arbitration was not state action); cf. *Glennon* v. *Dean Witter Reynolds, Inc.,* 1994 U.S. Dist. LEXIS 21081, *43-44 (M.D. Tenn. December 15, 1994) (question of whether judicial confirmation constitutes state action is moot because court will confirm only if it finds that arbitrator's award does not violate constitutional rights); *Sawtelle* v. *Waddell & Reed, Inc.,* 304 App. Div. 2d 103, 109-10, 754 N.Y.S.2d 264 (2003) (recognizing that "there is ample authority for the proposition that a private arbitration does not implicate due process concerns since, where the parties have voluntarily participated in the arbitration process, there is no state action involved, not even in the judicial confirmation of the punitive damage award");[12] but see *Commonwealth Associates* v. *Letsos,* 40

[12] *Sawtelle,* while recognizing that the weight of authority supports the conclusion that judicial confirmation of an arbitrator's award does not constitute state action, concluded that *BMW of North America, Inc.* v. *Gore,* supra, 517 U.S. 559, was nevertheless applicable to a challenge to such an award, because *Gore* "provides a guide for determining whether such an award is irrational." *Sawtelle* v. *Waddell & Reed, Inc.,* supra, 304 App. Div. 110.

F. Sup. 2d 170, 177 n.37 (S.D.N.Y. 1999) (criticizing *Davis* in dicta and noting that "[w]hile the procedures utilized in private arbitration do not constitute state action . . . the application of the coercive power of a court to confirm and enforce an arbitration award is arguably another matter" [citation omitted]); *In re Knepp* v. *Credit Acceptance Corp.*, 229 B.R. 821, 840-41 (Bankr. N.D. Ala. 1999) (following *Davis,* but criticizing opinion in dicta based on law review articles that claim that judicial confirmation of compelled arbitration can constitute state action); *Birmingham News Co.* v. *Horn,* 2004 WL 1293993, *37 (Ala. 2004) (distinguishing and criticizing *Davis*).

None of the cases relied upon by the defendant in arguing that the Supreme Court has repeatedly applied *Shelley*'s rule converting the conduct of a private actor into state action via judicial enforcement involves an application of the third *Edmonson* factor – that is, whether state action may be imputed to the conduct of a private actor because the claimed injury was aggravated in a unique way by the incidents of governmental authority. We discuss several of these cases by way of illustration. For instance, one of the principal cases relied upon by the defendant, *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), did not involve any attempt to impute state action to a private actor's conduct. The only state action question presented in that case was whether the Alabama courts' application of a state rule of law violated the petitioner's first and fourteenth amendment rights. Id., 265. Although a private actor had brought the civil action, the court did not consider whether the petitioner's action in bringing the lawsuit constituted state action or was converted to state action by the Alabama courts' judgment, because that issue was not presented in

the case. In other words, it was not the petitioner's action in bringing the suit that constituted the injury, but the state court's ruling in favor of him. Thus, *Sullivan* is not analogous to the present case, wherein the claimed underlying injury resulted from the conduct of a private actor – the arbitration panel. Similarly, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 668, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991), which involved a private cause of action for promissory estoppel, simply followed *Sullivan* in holding that "the application of state rules of law in state courts in a manner alleged to restrict [f]irst [a]mendment freedoms constitutes 'state action' under the [f]ourteenth [a]mendment." Just as in *Sullivan,* in *Cohen,* the issue was not presented and the court did not address whether the conduct of a private actor was converted into state action by the actions of the court – the only question was whether the action of the court itself constituted state action. The other authorities relied upon by the defendant are also distinguishable. In *Lugar* v. *Edmondson Oil Co.*, supra, 457 U.S. 941-42, for example, the court premised its finding of state action, in the context of ex parte attachment of property, on the fact that the private actor at issue in that case acted "jointly" with the state – not on a finding that the state authorized the private actor's conduct. Two other cases relied upon by the defendant, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), and *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), both arose in the context of garnishment actions and prejudgment attachments, a specific line of cases that culminated in *Lugar.* Although the court did not, either in *Sniadach* or in *Fuentes* expressly ground its finding of state action on a "joint action" analysis, *Lugar* later characterized those cases as resting exactly on that theory in arriving at the

conclusion that "whenever officers of the [s]tate act jointly with a creditor in securing the property in dispute," the state action requirement is met. *Lugar* v. *Edmondson Oil Co.*, supra, 932-33.

B

The defendant next claims that the arbitration award violates Connecticut public policy against excessive punitive damage awards, grounded in Connecticut common law and in the constitution of the United States, as interpreted by *BMW of North America, Inc.* v. *Gore*, supra, 517 U.S. 559. The defendant further contends that this policy applies equally to judicial and arbitration awards. We disagree.

We begin with the applicable standard of review. It is undisputed that the submission to arbitration was voluntary and unrestricted.[13] Generally, "[w]hen the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement." (Internal quotation marks omitted.) *State* v. *New England Health Care Employees Union*, 271 Conn. 127, 134, 855 A.2d 964 (2004).

[13] The arbitration clause of the parties' contract provides: "With the exception of seeking injunctive or other relief for violation of Confidential Information of a party pursuant to Section C above, any dispute arising [out] of or relating to this Agreement, including any issues relating to arbitrability or the scope of this arbitration clause, will be finally settled by arbitration in . . . accordance with the rules of the American Arbitration Association and the United States Arbitration Act and judgment upon the award rendered by the arbitrator(s) may be entered by any court with jurisdiction. The arbitration will be held in the Stamford, CT metropolitan area."

"When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission." *Garrity* v. *McCaskey,* 223 Conn. 1, 4-5, 612 A.2d 742 (1992). "[W]here [however] a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy." *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.,* 252 Conn. 416, 429, 747 A.2d 1017 (2000). Because the defendant's claim has a legitimate, colorable basis, de novo review of the award is appropriate.

An arbitrator's award may be vacated if it violates clear public policy. *State* v. *New England Health Care Employees Union,* supra, 271 Conn. 134. This rule is an exception to the general rule restricting judicial review of arbitral awards. Id. The exception, however, is "narrowly construed and . . . is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." (Internal quotation marks omitted.) Id., 135-36. "Our view that public policy exceptions to arbitral authority should be narrowly construed finds support in . . . *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.,* 484 U.S. 29, 44, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), [where] the United States Supreme Court concluded that a policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol, while 'firmly rooted in common sense,' did not

permit a court to set aside an arbitration award." *New Haven* v. *AFSCME, Council 15, Local 530,* 208 Conn. 411, 417, 544 A.2d 186 (1988). Therefore, the award must be "*clearly* illegal or *clearly* violative of a strong public policy." (Emphasis added; internal quotation marks omitted.) *State* v. *New England Health Care Employees Union,* supra, 135. Furthermore, "[t]he party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated." (Internal quotation marks omitted.) *State* v. *AFSCME, AFL-CIO, Council 4, Local 2663,* 257 Conn. 80, 91, 777 A.2d 169 (2001).

Thus, in the face of a challenge to an arbitral award on public policy grounds, we engage in a two step process: First, we determine "whether an explicit, well-defined and dominant public policy can be identified." (Internal quotation marks omitted.) *State* v. *New England Health Care Employees Union,* supra, 271 Conn. 137. "If so, [we] then [decide] if the arbitrator's award violated the public policy."[14] (Internal quotation marks omitted.) Id. We have

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[14] The dissent's argument, that our decision upholding the arbitrator's award violates the clearly defined public policy favoring arbitration, cannot survive this second prong of the public policy inquiry. Rather than demonstrate a violation of the public policy at issue, the dissent offers the following speculation: in light of our decision, parties will opt not to include arbitration clauses in their contracts. The dissent offers no evidence in support of this prediction and does not consider the more likely alternative – that is, that parties who are concerned about such a result will, instead, opt to include in arbitration clauses language that either caps or precludes punitive damages altogether, or subjects an arbitral punitive damages award to judicial review.

To put the point more generally, the dissent's argument is premised on the notion that parties engaged in negotiation over contract language will decide not to include an arbitration clause *at all,* because of the possibility that, in the event of a breach, the arbitration panel will

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been wary about vacating arbitral awards on public policy grounds because "implicit in the stringent and narrow confines of this exception to the rule of deference to arbitrators' determinations, is the notion that the exception must not be interpreted so broadly as to swallow the rule." *South Windsor* v. *South Windsor Police Union Local 1480, Council 15,* 255 Conn. 800, 815, 770 A.2d 14 (2001).

We have looked to a variety of sources in determining whether an arbitral award violates a well-defined public

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render an excessive punitive damages award that a court will not be able to overturn on the basis of the public policy exception to the generally limited scope of judicial review of such awards. This assumption is wholly speculative. As we have stated, parties who are negotiating over contractual terms – including whether to incorporate an arbitration clause – will be able to negotiate over the terms of that clause as well. There is absolutely no reason to assume that, if they want to include an arbitration clause in their contract, they will find it impossible to negotiate whatever limits they deem appropriate on the scope of the arbitrators' powers, and of judicial review of the exercise of those powers, including the potential for an excessive award of punitive damages.

Moreover, we believe it relevant that the astronomical awards envisaged by the dissent, although theoretically possible, are very unlikely. Simply because we can *conceive* of an arbitration award of the magnitude hypothesized by the dissent, does not mean that such an award is likely to occur. We ought not to make rules of law based on unrealistic hypotheses.

Thus, the fact that the dissent's entire public policy argument rests on speculative consequences makes evident that it fails to "'clearly [demonstrate]'" a violation of the public policy. *State* v. *AFSCME, AFL-CIO, Council 4, Local 2663,* 257 Conn. 80, 91, 777 A.2d 169 (2001). Specifically, we have stated that "[t]he public policy exception applies only when the award is clearly illegal or *clearly* violative of a strong public policy." (Emphasis added; internal quotation marks omitted.) *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO,* 265 Conn. 771, 783, 830 A.2d 729 (2003). We have never found a clear violation of a public policy premised on a purely speculative result and decline to do so now.

policy, and have cited, as examples of possible sources, statutes, administrative decisions and case law. *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 428. In those cases in which we have vacated an arbitral award on public policy grounds, the public policy has most commonly been grounded in the General Statutes. Rather than requiring that public policy be grounded on a particular type of source, however, in determining whether a party has satisfied its burden of demonstrating the existence of a well-defined public policy, we have instead focused our inquiry on whether the alleged public policy is in fact clearly discernible in the purported source. Because they establish the illegality of an act, criminal statutes often provide a clear basis for a public policy. For example, in *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 36-37, 757 A.2d 501 (2000), we affirmed the trial court's decision vacating an arbitration award that reinstated employment of an employee who had been convicted of embezzlement of his employer's funds following a plea of nolo contendere because the award had violated the public policy against embezzlement found in General Statutes § 53a-119(1), which criminalizes embezzlement by defining it as a type of larceny. The public policy against embezzlement, we held, "encompasse[d] the policy that an employer may not be required to reinstate the employment of one who has been convicted of embezzlement of his employer's funds, whether that conviction follows a trial, a guilty plea, or a plea of nolo contendere." Id., 46-47. We also found a dominant and clearly defined public policy in *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 472-73, 747 A.2d 480 (2000), where we affirmed the trial court's decision to vacate an arbitration award that had ordered the reinstatement of a correction officer who had

been convicted of harassment under General Statutes § 53a-183(a), for placing an anonymous, obscene and racist telephone call to a state legislator from a correctional facility telephone while he was on duty because the award had violated the public policy against harassment as expressed in the statute.

We have also found public policy clearly defined in noncriminal statutes. For instance, in *Board of Trustees* v. *Federation of Technical College Teachers,* 179 Conn. 184, 187, 425 A.2d 1247 (1979), we affirmed the trial court's decision to vacate an arbitration award that had ordered, pursuant to provisions of a collective bargaining agreement between the union and the plaintiff board of trustees for state technical colleges, that full-time faculty members employed by the board who worked 171 days per year were entitled to accrue fifteen days of sick leave per year. We concluded that the award violated the public policy codified in General Statutes § 5-247(a) that those faculty members were entitled to only twelve and one-half sick days per year. Id., 194. In *State* v. *New England Health Care Employees Union,* supra, 271 Conn. 138, 855 A.2d 964, we held that General Statutes §§ 17a-238(b) and (e), 17a-247b(a) and 17a-247c(a) established a clearly defined and dominant public policy of protecting department of mental retardation clients from mistreatment, and that the policy was not violated when an arbitrator ordered the reinstatement of an employee who was found to have abused a client.

Statutes have not been the exclusive source from which we have found clear statements of public policy. We also have looked to city charters and, on one occasion, to the Rules of Professional Conduct. In *Waterbury Teachers Assn.* v. *Furlong,* 162 Conn. 390, 423, 294 A.2d 546 (1972),

we concluded that a city charter provision provided a sufficient basis to establish a well-defined and dominant public policy. In that case, we affirmed the trial court's decision to vacate an arbitration award limiting a teacher's contribution to the retirement system to 1 percent of her pay in accordance with the union contract. Id., 425. We grounded our decision on § 2731 of the Waterbury charter, which provided in relevant part: "The rate of contributions to be made by a teacher participant of the retirement system shall be *three percent* of pay." (Emphasis added; internal quotation marks omitted.) Id., 422. We agreed with the trial court's conclusion that the award had violated a clearly stated public policy. Id., 425. In *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 416, we looked to the Rules of Professional Conduct as the source for public policy. In that case, we concluded that an arbitrator's finding that the plaintiff had forfeited his right to postemployment benefits by practicing law in violation of a noncompetition provision in a partnership agreement did not violate the public policy of facilitating clients' access to an attorney of their choice embodied in rule 5.6 of the Rules of Professional Conduct. Id., 418. In analyzing rule 5.6 to discern the nature of the implicated policy, we focused on "the purpose of the rule, its express language, and the manner in which courts in other jurisdictions have applied its restriction." Id., 438. On the basis of that analysis, we concluded that the purpose of the rule was to ensure clients the freedom of counsel of their choice. Id.

In other cases, we have found that the statute relied upon as a ground for the alleged public policy was too tenuously related to the subject matter to constitute a ground for a clearly defined and dominant public policy.

For example, in *State* v. *AFSCME, AFL-CIO, Council 4, Local 2663,* supra, 257 Conn. 81-82, we concluded that the state did not meet its burden of proving that an arbitration award that granted overtime pay to staff attorneys for the commission on human rights and opportunities violated what the state claimed was a clear public policy of prohibiting professional employees from receiving overtime compensation. In arguing for the existence of the public policy, the state pointed to the Federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), and the related state statute, General Statutes § 5-245(b). *State* v. *AFSCME, AFL-CIO, Council 4, Local 2663,* supra, 90-92. We concluded that the purpose of those statutes is violated when workers are paid less than the amount set forth therein, and that employers do not violate the purpose of the statutes by providing employees with greater benefits than those required. Id., 93-94. In another case, *South Windsor* v. *South Windsor Police Union Local 1480, Council 15,* supra, 255 Conn. 802, we reversed the Appellate Court's judgment vacating an arbitral award and disagreed that the award, which ordered the plaintiff town to reinstate a union member to his position as a police officer for the town, violated "the specific public policy of a town's control over the fitness for duty of its police force . . . . " (Internal quotation marks omitted.) We concluded that General Statutes §§ 7-274, 7-276 and 7-294d(a)(10), or § 7-294e-16(j) of the Regulations of Connecticut State Agencies, all of which establish a town's authority to establish a board of police commissioners and set entry level requirements for town officers, provided a sufficient basis to establish the purported public policy. Id., 813-15. In analyzing the various statutes and regulations, we concluded that they did not establish an explicit public policy that "a town has control over *termination* for fitness for

duty of a police officer such as [the officer who had been terminated]." (Emphasis added.) Id., 819.

Thus, our case law establishes that, although we have been willing to find a public policy grounded in a variety of sources, the party seeking to establish the public policy bears a heavy burden of showing the existence of such a well-defined and dominant public policy. Indeed, we have in the past found a clear statement of that policy in some objectively stated form, such as a statute, city charter or rule of professional conduct. Although we do not decide that a statement in such a form is *always* required as the predicate for the public policy exception, we nonetheless adhere to the principle that the public policy must be "explicit, well defined and dominant . . . . " (Internal quotation marks omitted.) *State* v. *New England Health Care Employees Union,* supra, 271 Conn. 137.

Applying these principles to the present case, we conclude that the defendant has failed to sustain its burden of establishing that the arbitration panel's award violated a clearly demonstrated Connecticut public policy against excessive damage awards. In fact, the only statute relevant to the arbitration panel's award of punitive damages supports the opposite conclusion. The award was based on the panel's finding that the defendant violated CUTPA, which expressly allows the award of punitive damages, and does not, by its express terms, provide a cap on the amount of damages awarded. See General Statutes § 42-110g(a).[15]

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[15] The defendant argues that the absence of a limit on punitive damages awards in CUTPA must be read against the backdrop of the public policy established by the common law of this state against

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The defendant contends that *BMW of North America, Inc.* v. *Gore,* supra, 517 U.S. 559, establishes a public policy against excessive punitive damage awards. In *Gore,* the United States Supreme Court concluded that a *jury award* of punitive damages, which, after remittitur, was $2 million, was grossly excessive in violation of the

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excessive punitive damage awards. Because we conclude that our case law does not establish a well-defined and dominant public policy against such awards, we reject this contention.

Moreover, we disagree with the dissent that, based on previous court awards pursuant to § 42-110g(a), we should infer that this is an implied limit on punitive damages awarded under CUTPA. Even if we were to agree that such a limit might be inferred in a case involving a judicial action based upon CUTPA, a question we do not reach, such an inference would be insufficient to support a clear, well-defined and dominant public policy against the imposition of excessive punitive damages in a private, consensual arbitration proceeding. The mere fact that the dissent must rely on the past practices of the trial court to *infer* such an implied limit on the punitive damages provision of CUTPA, at the same time that it recognizes that other statutes expressly provide for limits on punitive damages, supports our conclusion that our precedents are insufficient to establish a clear, well-defined and dominant public policy against excessive punitive damages. Put another way, it is counterintuitive to suggest that there is a clear, well-defined and dominant public policy that may be identified only by inference from a small sample of trial court cases and other precedents that neither expressly state nor clearly imply that they rest on such a policy.

This does not mean, and we do not decide, that *any* arbitral award of punitive damages, no matter how grossly excessive, is insulated from judicial review. We can conceive that there may be such a grossly excessive award that the court would be justified in vacating it on the basis of the arbitrators' evident partiality; see General Statutes § 52-418(a)(2); or manifest disregard of the law. The defendant does not claim on appeal, however, that this award fits either of those criteria.

We also disagree with the dissent that our decision necessarily means that an excessive compensatory damage award will be unreviewable under the public policy exception. That is a question that has not been presented, briefed or argued before us.

defendant's right to due process. Id., 567, 574-75. The court in *Gore*, however, was concerned only with whether the due process clause of the fourteenth amendment barred a *state* from imposing grossly excessive punitive damages on a tortfeasor. Id., 562. Therefore, the decision was premised on the presence of state action, an element we have already found lacking under the factual circumstances of the present case. Thus, although *Gore* supports a finding of a public policy against the imposition of grossly excessive punitive damages by the state, an issue we do not address in this opinion, it cannot serve as a basis for concluding that Connecticut has a public policy against the imposition of excessive punitive damages by a private actor, such as an arbitration panel.[16]

The second source advocated by the defendant as a ground for demonstrating a public policy against excessive punitive damage awards is the state's common law. We have not found, however, and the defendant has not produced, any decision or line of decisions clearly demonstrating the existence of a well-defined and dominant

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[16] The dissent contends that, regardless of *Gore*'s application solely to state action, we should infer from that case a clear and well-defined, dominant public policy against excessive punitive damages in general, and conclude that the award in the present case violates that public policy. Although we agree with the dissent that the constitution may be a source of public policy in an appropriate case, we disagree with the application of *Gore* for that purpose in the present case. Were we to draw such an inference, we would render meaningless *Gore*'s own stated limitation of its application to state actors by circumventing the state action requirement. Moreover, the same reasoning employed by the dissent would be applicable to other due process protections as well, including procedural due process, thus paving the way for constitutionalizing a wide variety of private conduct through public policy analysis. We decline to countenance this indirect imposition of constitutional norms on private actors.

public policy against the imposition of excessive punitive damages. Instead, the defendant attempts to glean the public policy from various principles established by our case law and court practices, such as: a reviewing court's authority to overturn a jury award as excessive; see *Gray* v. *Fanning,* 73 Conn. 115, 117, 46 A. 831 (1900); a court's power to reduce the amount of a jury award; Practice Book § 17-3; the prohibition against jury awards of punitive damages; *Hanna* v. *Sweeney,* 78 Conn. 492, 494, 62 A. 785 (1906); the limitation, in cases of wilful or wanton misconduct, of punitive damages to attorney's fees, to the exclusion of traditional punitive damages; *Bodner* v. *United Services Automobile Assn.,* 222 Conn. 480, 492, 610 A.2d 1212 (1992) (citing general rule that "common law punitive damages . . . in Connecticut are limited to the plaintiff's attorney's fees and nontaxable costs"); and the rule prohibiting penalty clauses in contracts, but permitting liquidated damages clauses. *Norwalk Door Closer Co.* v. *Eagle Lock & Screw Co.,* 153 Conn. 681, 686, 220 A.2d 263 (1966).

Although all of these rules evince a generalized concern with limiting damage awards, the cases and practices cited by the defendant fail to satisfy its heavy burden of demonstrating a well-defined and dominant public policy against excessive punitive damages. Put another way, we simply fail to find in the combination of general limitations on damage awards in courts, the kind of well-defined and dominant public policy against excessive punitive damages that would justify setting aside a private, consensual arbitration award on the basis of the

stringent and narrow confines of the public policy exception.[17]

II

In the second appeal in this case, the plaintiff contends that the trial court abused its discretion in denying its motion for prejudgment and postjudgment interest. We disagree. The following additional facts are relevant to our consideration of the plaintiff's claim.

At the time that the plaintiff applied for confirmation of the arbitration award, it also requested prejudgment interest pursuant to General Statutes § 37-3a.[18] The trial court confirmed the arbitration award, but did not rule on the plaintiff's request for prejudgment interest. Subsequently, the plaintiff filed a motion seeking both prejudgment interest pursuant to § 37-3a and postjudgment interest pursuant to General Statutes §§ 37-3a and 52-421(b).[19] In a later ruling, the court denied the plaintiff's

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[17] Thus, we disagree with the dissent that the rule, originating in *Hanna* v. *Sweeney*, supra, 78 Conn. 494, limiting punitive damages at common law to attorney's fees and the costs of litigation is sufficient to establish a clear, well-defined and dominant public policy against excessive punitive damages generally. To reiterate what we stated previously, it is counterintuitive to suggest that there is a clear, well established and dominant public policy that may only be identified by inference and implication from common-law precedents that neither expressly state nor clearly imply that they are based on such a policy.

[18] General Statutes § 37-3a(a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ."

[19] See footnote 6 of this opinion.

motion for prejudgment and postjudgment interest on the ground that the defendant's arguments in support of its motion to vacate the arbitration award were not frivolous. Subsequently, the court denied the plaintiff's motion to open the judgment with respect to postjudgment interest.

The plaintiff argues that, because the purpose of arbitration is to provide speedy resolution of disputes, the deference generally accorded to a trial court's determination regarding prejudgment and postjudgment interest should not be adhered to in the context of an arbitration award. We disagree.

The decision of whether to grant interest under § 37-3a is "primarily an equitable determination and a matter lying within the discretion of the trial court." (Internal quotation marks omitted.) *O'Hara* v. *State,* 218 Conn. 628, 643, 590 A.2d 948 (1991). "In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . The court's determination regarding the award of interest should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . . Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances." (Citation omitted; internal quotation marks omitted.) *Bower* v. *D'Onfro,* 45 Conn.App. 543, 550-51, 696 A.2d 1285 (1997).

The trial court cited as its primary reason for denying the plaintiff's motion for interest pursuant to § 37-3a that the defendant had not wrongfully withheld the money because its arguments in opposition to the application to confirm the award and in support of its motion to vacate

the award were not frivolous. This was an appropriate equitable consideration within the discretion of the trial court. The trial court's decision, therefore, was not an abuse of discretion.

The judgment is affirmed.

In this opinion SULLIVAN, C. J., and KATZ, PALMER and VERTEFEUILLE, Js., concurred.

ZARELLA, J., with whom NORCOTT, J., joins, dissenting. I agree with the majority insofar as it holds that the judicial confirmation of an arbitration award does not constitute state action. I disagree with and am perplexed by the majority's conclusion in part I B of its opinion that this state does not have a well-defined and dominant public policy against excessive punitive damage awards. In my view, such a policy is evident in case law that spans nearly a century and is a foundational principle of any dispute resolution system, including arbitration. Because I believe that a $5 million punitive damage award under the circumstances of this case not only violates that policy, but also undermines the equally well settled policy encouraging arbitration as an efficient method of dispute resolution, I respectfully dissent.

I set forth an expanded rendition of the facts in order to place the issues posed by this case in their proper context. In 1994, Andrew Bronfman, an attorney, and Andrew Fineberg, a real estate professional, decided to embark on a business venture that they believed would be highly lucrative. They planned to sell subscriptions for physician, hospital and other medical services to persons located throughout the country who otherwise would not have access to health insurance at reasonable rates. In order to execute that vision, Bronfman and Fineberg

formed MedSaver Health Programs, Inc., the predecessor to the plaintiff, MedValUSA Health Programs, Inc., and, in 1998, entered into an agreement with the defendant, MemberWorks, Inc., which provides membership programs that offer consumer discounts on a variety of products and services in the health care, finance and entertainment industries. Pursuant to that agreement, the defendant was to assemble networks of physicians, hospitals and other health care providers that would render services to the plaintiff's targeted constituencies at preferred rates. The agreement also obligated the defendant to deliver to the plaintiff certain marketing and fulfillment materials,[1] and to provide support services to the plaintiff's customers and sales force. Although both parties invested a substantial amount of time and energy in the venture, the defendant never was able to establish networks and to deliver related materials and services that were satisfactory to the plaintiff.

In May, 2000, the plaintiff closed its business and thereafter filed a demand for arbitration, claiming in counts one and two, respectively, that the defendant had breached the parties' contract and the implied duty of good faith and fair dealing. The plaintiff also alleged in count three that the defendant had engaged in unfair and deceptive trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff sought compensatory damages, attorney's fees and punitive damages pursuant to CUTPA, interest and costs.

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[1] Fulfillment materials included membership cards and information produced for the benefit of the plaintiff's members. See footnote 4 of the majority opinion.

In the proceedings before the arbitration panel, the plaintiff argued that the defendant's failure to perform its contractual obligations was not solely the result of ineptitude, but also was the product of a calculated, deliberate plan to undermine the plaintiff's business and to usurp the plaintiff's visionary business concept for its own benefit. The plaintiff asserted that the defendant's actions caused it to lose approximately $39.8 million in lost profits and sought compensatory damages in that amount. The plaintiff further argued that certain of the actions that gave rise to the compensatory damage claim also warranted a "substantial" punitive damage award under CUTPA. The plaintiff, however, did not suggest to the arbitrators an appropriate dollar amount for that award, nor did it articulate the legal standard by which it should be measured.

The defendant responded that, as of October, 1999, it had substantially fulfilled its obligations under the terms of the parties' agreement. It claimed that the plaintiff's lack of success was not due to its action or inaction but, instead, was attributable to the plaintiff's failure to mobilize its business and to provide a sufficient infrastructure to support a national sales effort. Indeed, during the course of the arbitration proceedings, Fineberg admitted that the plaintiff had not hired any employees, entered into binding contracts with independent contractors, secured office space or advertised its product in any substantial way.

The arbitration panel found in favor of the plaintiff on all counts but did not award any compensatory damages because the plaintiff "[had] not established them with

reasonable certainty."[2] Notwithstanding the absence of any proved actual damages, the panel awarded the plaintiff $5 million in punitive damages in connection with the defendant's violation of CUTPA. Although the arbitration panel did not cite the legal standards upon which it relied in determining the amount of the award, it noted several incidents of unfair and deceptive acts that, in its view, justified such a result. These incidents, which are summarized aptly by the majority, included: "(1) the failure to disclose to the plaintiff the nature of its communications with network 1, some of which called into question the availability of that network for the plaintiff's enterprise; (2) the failure to disclose to the plaintiff the availability of other networks; (3) a history of misrepresenting its obligations to the plaintiff under the contract; (4) the refusal to meet with the plaintiff in a timely manner and the unavailability of one of its employees for conference calls; (5) the failure to inform the plaintiff about the elimination of free dental services from the program and its inadequate responses to the plaintiff's request for information . . . (6) the failure to provide the plaintiff with new fulfillment materials necessitated by that elimination; (7) the failure to approve in a timely manner hospital lists for advertising; (8) an insistence that all communications with the plaintiff be in writing; and (9) the preparation and distribution of an inaccurate summary of a meeting with the plaintiff."

On appeal to this court, the defendant contends that the $5 million award violates the state's public policy against excessive punitive damages that is deeply rooted

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[2] In fact, the arbitration panel did not award even nominal damages.

in the common law of this state and the United States constitution. I agree.

For nearly 100 years, this court has adhered to the rule first announced in *Hanna* v. *Sweeney*, 78 Conn. 492, 494-95, 62 A. 785 (1906), that punitive damages under the common law are limited to attorney's fees and other litigation expenses. In adopting that rule, we recognized that the traditional common-law doctrine affords a jury unfettered discretion to award damages that not only compensate the plaintiff for his or her injury, but also punish the wrongdoer. See id., 493-94. Although we observed that the traditional rule prevailed in most jurisdictions, we nonetheless declined to embrace it, noting that it was at odds with "the general rule of compensation in civil cases . . . . " Id., 494. Instead, we concluded that punitive damages awarded to a plaintiff in this state must be limited to "expenses of litigation in the suit, less . . . taxable costs." Id.

Nearly eighty years later, we reaffirmed our commitment to the common-law rule in *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, 193 Conn. 208, 477 A.2d 988 (1984). The plaintiff in that case had urged this court to abandon our conservative measure and "join the majority of jurisdictions [that] permit an amount of 'punitive' damages which serves to 'punish and deter' wrongdoers who act wantonly and recklessly." Id., 235. In declining that invitation, we observed that "[v]arious authorities have discussed the many facets of the propriety of punitive damages and their measure in civil cases and have offered conflicting views." Id., 237. We noted that, "[a]lthough various justifications, such as the elements of deterrence and punishment, have been offered in favor of the availability of punitive damages . . .

[c]ountless cases remark that such damages have never been a favorite in the law. . . . Typically, those who disfavor punitive damage awards in civil cases point to the prospect that such damages are frequently the result of the caprice and prejudice of jurors, that such damages may be assessed in amounts which are unpredictable and bear no relation to the harmful act, and that the prospect of such damages assessed in such a manner may have a chilling effect on desirable conduct." (Citation omitted; internal quotation marks omitted.) Id.

We further explained that, "[i]n permitting awards of punitive damages, but limiting such damages as we do, our rule strikes a balance – it provides for the payment of a victim's costs of litigation, which would be otherwise unavailable to him, while establishing a clear reference to guide the jury fairly in arriving at the amount of the award." Id. We also stated that, "although our rule is a limited one, when viewed in light of the ever rising costs of litigation, [it] does in effect provide for some element of punishment and deterrence in addition to the compensation of the victim. Thus, in limiting punitive damage awards to the costs of litigation less taxable costs, our rule fulfills the salutary purpose of fully compensating a victim for the harm inflicted on him while avoiding the potential for injustice which may result from the exercise of unfettered discretion by a jury." Id., 237-38. Eight years later in *Berry* v. *Loiseau,* 223 Conn. 786, 825, 614 A.2d 414 (1992), we once again affirmed our continued adherence to that rule. Thus, for nearly a century, we have remained steadfast in our commitment to a common-law measure of punitive damages that is indisputably one of the most conservative in the nation.

Against this common-law backdrop, the legislature has authorized punitive damage awards for certain causes of action. These statutes fall into three categories: (1) those that limit the amount of the award to no more than two times the actual damages incurred;[3] (2) those that designate a specific, albeit modest, dollar limit for such awards;[4] and (3) those that authorize punitive damages, but leave the amount of the award to the discretion of the court.[5] The provision of CUTPA at issue in the present case, namely, § 42-110g(a), is of the latter type. It provides that "[t]he court may, in its discretion, award punitive damages . . . ." General Statutes § 42-110g(a).

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[3] E.g., General Statutes § 35-53(b) (punitive damage awards limited to amount equal to twice actual loss realized from wilful and malicious misappropriation of trade secrets); General Statutes § 52-240b (in product liability action, punitive damages must "not . . . exceed an amount equal to twice the damages awarded to the plaintiff").

[4] E.g., General Statutes § 46a-89(b)(2) (punitive damages limited to $50,000 for discriminatory practice related to rental or sale of dwelling or commercial property or in provision of public accommodations); General Statutes § 46a-98(d) (punitive damages limited to "the lesser of five thousand dollars or one per cent of the net worth of the creditor" for discriminatory credit practices); General Statutes § 52-564a(a)(3) (in civil action based on defendant's act of shoplifting, merchant may recover no more than $300 in punitive damages).

[5] E.g., General Statutes § 16-8d(b) (in action brought by employee alleging retaliation for disclosure of substantial misfeasance, malfeasance or nonfeasance in management of, inter alia, public service company, court "may award punitive damages"); General Statutes § 19a-550(e) ("punitive damages may be assessed" in civil action in which there is finding of wilful or reckless deprivation of rights under patients' bill of rights); General Statutes § 31-51q (authorizing punitive damage awards against employers who wrongfully discharge or discipline employees for exercising their constitutional rights); General Statutes § 36a-618 (authorizing punitive damages against loan brokers who violate certain banking laws).

The legislature enacted CUTPA in order to eliminate or to discourage "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b(a). Recognizing that the attorney general is hampered in his enforcement efforts by limited staffing, the legislature, in its design of the statutory scheme, sought "to create a climate in which private litigants help to enforce the ban on [such] practices or acts." *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 618, 440 A.2d 810 (1981). In order to advance that objective, the statute affords a plaintiff who establishes CUTPA liability "a remedy [that is] far more comprehensive than the simple damages recoverable under common law." Id., 617. Specifically, a plaintiff may recover both costs and attorney's fees; General Statutes § 42-110g(d); and punitive damages. General Statutes § 42-110g(a). Accordingly, punitive damages under CUTPA are not intended merely to compensate the plaintiff for the harm caused by the defendant but, rather, serve a broader, twofold purpose. First, they foster private enforcement of unfair trade practices by providing a reasonable incentive to litigate. See *Hinchliffe* v. *American Motors Corp.*, supra, 617-18. Second, they deter the defendant and others from engaging in future violations of CUTPA. See, e.g., *Tingley Systems, Inc.* v. *Norse Systems, Inc.*, 49 F.3d 93, 96 (2d Cir. 1995). Viewed in this light, punitive damages under CUTPA implicate public policy concerns because they are designed to protect and to vindicate the public interest. See *Freeman* v. *Alamo Management Co.*, 221 Conn. 674, 679, 607 A.2d 370 (1992).

The legislature did recognize, however, that the absence of a definitive standard for measuring punitive damages under CUTPA could give rise to excessive

awards. In order to safeguard against that risk, the legislature vested the authority to make such awards in the court, rather than in the jury; General Statutes § 42-110g(a) and (g); presumably because it believed that a court would be more likely to fix punitive damages at amounts that are reasonable and consistent with the policy goals of the statute.

Although this court never has articulated a formula for measuring punitive damages under CUTPA, awards made in past cases traditionally have been modest. See *Sawtelle* v. *Waddell & Reed, Inc.*, 304 App. Div. 2d 103, 112, 754 N.Y.S.2d 264 (2003) (surveying punitive damage awards under CUTPA and noting that "the awards range from $250 to $450,000" [internal quotation marks omitted]). Notably, the Second Circuit Court of Appeals recently has observed that the largest punitive damage award under CUTPA for "solely economic loss without allegations of pattern and practice [was] approximately $340,000." *Fabri* v. *United Technologies International, Inc.*, 387 F.3d 109, 126 (2d Cir. 2004), citing *Advanced Financial Services, Inc.* v. *Associated Appraisal Services, Inc.*, 79 Conn.App. 22, 33, 830 A.2d 240 (2003). Our research confirms that finding. Thus, not only does our common law evince a conservative public policy stance toward punitive damages; see *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, supra, 193 Conn. 237-38; *Hanna* v. *Sweeney*, supra, 78 Conn. 494-95; so, too, does the line of decisions upholding punitive damage awards under CUTPA. See *Sawtelle* v. *Waddell & Reed, Inc.*, supra, 304 App. Div. 2d 112-14 (surveying cases). Unlike the majority, I believe that the foregoing case law clearly implies the existence of a well-defined and dominant public policy against the imposition of excessive punitive damages.

In *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585-86, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the United States Supreme Court concluded that grossly excessive punitive damage awards violate the due process clause of the fourteenth amendment to the United States constitution. The plaintiff in *Gore* brought an action against BMW of North America, Inc. (BMW), among others, under Alabama's fraud statute after he discovered that the new car that he had purchased from BMW had been damaged and repainted prior to delivery. Id., 563. The jury awarded him $4000 in compensatory damages and $4 million in punitive damages; id., 565; the latter of which subsequently was reduced to $2 million by the Alabama Supreme Court. Id., 567. On appeal to the United States Supreme Court, however, that court held that the $2 million award was "grossly excessive," and, therefore, a violation of due process, because BMW did not have fair warning that its misconduct could spawn such a severe penalty. Id., 574-75. In reaching that result, the court evaluated the award against three guideposts: (1) "the degree of reprehensibility of the defendant's conduct"; id., 575; (2) the "ratio [of punitive damages] to the actual harm inflicted on the plaintiff"; id., 580; and (3) the difference between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct . . . . " Id., 583.

The defendant contends that *Gore* is relevant to his public policy argument because it is based on fundamental notions of fairness and fair warning that, together with the common law, "forge a strong public policy for placing substantive limits on awards of punitive damages." In other words, if an award is so large that it would violate the constitution if issued by a court of law, then we also

should conclude that such an award contravenes public policy when it is made by an arbitration panel. Although I believe that Connecticut's public policy is even more restrictive than the limitations set forth in *Gore,* I agree with the defendant that, at a minimum, the state disfavors any punitive damage award that is so large that it "offends [e]lementary notions of fairness [and notice as] enshrined in [federal] constitutional jurisprudence . . . . " Id., 574. In reaching that conclusion, I do not hesitate to embrace constitutional principles as a source of public policy when, as in the present case, it makes sense to do so because, as the defendant notes, "[i]t is difficult to conceive of a more elemental point of origin for public policy than the nation's constitutional guarantees."[6]

The majority rejects this argument, however, concluding that "[t]he court in *Gore* . . . was concerned only with whether the due process clause of the fourteenth amendment barred a *state* from imposing grossly excessive punitive damages on a tortfeasor. . . . Thus, although *Gore* supports a finding of a public policy against the imposition of grossly excessive punitive damages by the state . . . it cannot serve as a basis for concluding that Connecticut has a public policy against the imposition of excessive punitive damages by a private actor, such as an arbitration panel." (Citation omitted; emphasis added.) In providing such an abbreviated response to the defendant's argument, the majority fails to consider the broader import of *Gore* in the context of this case and disregards the impact of its decision on another equally important

[6] See, e.g., *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 585, 693 A.2d 293 (1997) (recognizing that public policy can trace its roots to constitutional provisions).

policy, namely, that favoring arbitration as an efficient and economic system of dispute resolution.

In its public policy argument, the defendant does not contend that *Gore* is relevant to this case because the substantive due process guarantees of the United States constitution apply to the arbitral forum. Rather, the defendant invokes the underlying principles of *Gore* in support of its claim that any punitive damage award that is so grossly excessive that it does not satisfy even the minimal constitutional standards of fairness and notice violates public policy irrespective of the forum in which it is issued. I agree with the defendant for the reasons set forth previously and further note that the same principles of fairness and notice that the United States Supreme Court relied on in finding a due process violation in *Gore* also apply in the context of arbitration, even though they are rooted in a different doctrine. In particular, they are inherent in the basic principle of contract law that damages arising from any contract, including one to arbitrate disputes, must be within the reasonable contemplation of the parties when they enter into the contract. See *Garrity* v. *McCaskey,* 223 Conn. 1, 11, 612 A.2d 742 (1992) ("although the discretion conferred on the arbitrator by the contracting parties is exceedingly broad, modern contract principles of good faith and fair dealing recognize that even contractual discretion must be exercised for purposes reasonably within the contemplation of the contracting parties"). A punitive damage award can be within the contemplation of the parties only if they had fair warning of it when they entered into the agreement to arbitrate. Despite these parallel concepts, the majority, while conceding that a grossly excessive punitive damage award that offends the fairness and notice principles of *Gore* would

violate public policy if issued by a court of law, concludes that the same award rendered by an arbitration panel would not. That simply does not make sense to me because the latter award provides no more notice and is no less unfair than the former. Thus, in limiting its analysis to whether the due process clause applies, the majority completely ignores the point of the defendant's argument and reaches a flawed conclusion that is based on a distinction without a meaningful difference.

I also find it troubling that the majority's ill-conceived reasoning is not confined to this case, but extends to any punitive damage award issued by an arbitrator no matter how large that award may be. Under its rationale, a $50 million punitive damage award or even a $5 billion award would not violate public policy and, therefore, would be immune from judicial review.[7] It does not take much

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[7] This observation prompted the majority to write "that the astronomical awards envisaged by the dissent, although theoretically possible, are very unlikely . . . [and][w]e ought not to make rules of law based on unrealistic hypotheses." Footnote 14 of the majority opinion. In response, I simply note that we need not look any farther than this case to find an astronomical award because, in my view, a $5 million punitive damage award in the absence of even nominal damages fits that bill. More importantly, the majority does not disagree that its reasoning would apply to a punitive damage award of any size, but merely suggests that we need not worry about the reach of its decision – a position that I believe is incompatible with a sound adjudicative process.

What I find even more alarming, and even more threatening to the state's policy of encouraging arbitration, however, is that there apparently is nothing in the majority's reasoning that would preclude it from applying to compensatory damage awards in arbitration proceedings. Thus, grossly excessive compensatory or punitive damage awards would not be subject to review by the courts under the majority's rationale. After today's decision, I wonder how any attorney could, in

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good conscience, expose his client to the risk of excessive damages by agreeing to an arbitration clause in a contract.

The majority responds to this concern by merely registering its disagreement with the notion that its "decision necessarily means that an excessive compensatory damage award will be unreviewable under the public policy exception." Footnote 15 of the majority opinion. In rendering that cursory response, the majority once again offers no principled basis for its disagreement with my observation, nor does it explain why its rationale also would not embrace excessive compensatory damage awards.

The majority nevertheless suggests that an excessive award might be reviewable by the courts on grounds set forth in § 52-418 and the case law interpreting that provision. See id. In particular, the majority notes that it "can conceive that there may be such a grossly excessive award that the court would be justified in vacating it on the basis of [an] arbitrators' evident partiality; see General Statutes § 52-418(a)(2); or manifest disregard of the law." Footnote 15 of the majority opinion; see, e.g., *Garrity* v. *McCaskey*, supra, 223 Conn. 8-9. I do not believe that either of these grounds for vacating an arbitration award is sufficient to safeguard against the risk of excessive punitive damage awards by arbitrators. Although I acknowledge that a grossly excessive punitive damage award might be evidence of the arbitrator's partiality, the size of the award alone generally would not be sufficient to prove that "there has been evident partiality or corruption on the part of any arbitrator. . . ." General Statutes § 52-418(a)(2).

With regard to the second ground cited by the majority, namely, an arbitrator's manifest disregard of the law, we have stated that, in order for a case to come within the reach of that doctrine, the defendant must show, inter alia, that "[t]he governing law alleged to have been ignored by the arbitrators [is] well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Garrity* v. *McCaskey*, supra, 223 Conn. 9. In light of the majority's holding today, I cannot comprehend how that exception would apply in future cases of this nature. If the majority cannot find ample evidence of a well-defined and dominant public policy disfavoring excessive punitive damages awarded by an arbitration panel, then how could a defendant possibly establish that the arbitrator disregarded a "well defined, explicit, and clearly applicable" law limiting the amount of those awards? (Internal quotation marks omitted.) Id. Moreover, even if a defendant somehow could clear that hurdle, the exception would apply only in those cases in which the record reveals that an "arbitrator appreciate[d] the existence of a

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foresight to predict that the majority's decision will cause parties to shun arbitration as a preferred method of dispute resolution because it will expose them to virtually unlimited punitive damage awards without any meaningful recourse from the courts.[8] I therefore submit that the

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clearly governing legal principle but decide[d] to ignore or pay no attention to it." (Internal quotation marks omitted.) Id. For the foregoing reasons, I maintain that the public policy exception is the most viable path for the judicial review of grossly excessive punitive damages awarded in an arbitral forum because it offers certainty and consistency.

[8] The majority states that my prediction is "wholly speculative" because it assumes that parties will completely avoid arbitration and "does not consider the more likely alternative – that is, that parties who are concerned about such a result will, instead, opt to include in arbitration clauses language that either caps or precludes punitive damages altogether, or subjects an arbitral punitive [damage] award to judicial review." Footnote 14 of the majority opinion. Although I realize that predicting human behavior is not an exact science, it simply defies common sense to think that the majority's decision will not discourage parties from arbitrating their disputes, particularly when they realize that its rationale applies to excessive punitive damages *and* potentially to excessive compensatory damages. See footnote 7 of this opinion. I further believe that the scenario advanced by the majority is not entirely plausible because many parties will be unwilling to sign a clause that eliminates or limits punitive damages, particularly if they bear more risk from the venture than their counterparts. Indeed, when faced with such a provision, they may prefer to litigate in a court of law, where full remedies are available to them, or simply walk away from the contract.

I also note that contract provisions that eliminate or limit punitive damages would allow wrongdoers who engage in egregious misconduct to escape the appropriate punishment in situations that warrant a reasonable punitive damage award beyond that authorized by the contract. Because statutory punitive damages are designed to protect the public interest, I do not believe that we should encourage private parties to contract them away.

With respect to arbitration clauses that provide for expanded judicial review of punitive damage awards, it is clear that General Statutes § 52-418 narrowly circumscribes the grounds on which courts

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majority opinion, in addition to violating the state's public policy disfavoring excessive punitive damages, also undermines the well established public policy favoring arbitration. Even the majority implicitly concedes that this latter policy is dominant, well-defined and expressly stated. See, e.g., *AFSCME, Council 4, Local 704* v. *Dept. of Public Health,* 272 Conn. 617, 626, 866 A.2d 582 (2005) ("we are mindful of the strong public policy favoring arbitration"); *New England Pipe Corp.* v. *Northeast Corridor Foundation,* 271 Conn. 329, 337, 857 A.2d 348 (2004) ("[a]rbitration is [a] favored [method of dispute resolution] because it is intended to avoid the formalities, delay, expense and vexation of ordinary litigation" [internal quotation marks omitted]); *Stratford* v. *International Assn.*

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may vacate an arbitration award, and I seriously question whether a party can expand them by contract. Cf. *Pina* v. *Pina,* 55 Conn.App. 42, 46, 737 A.2d 961 (1999) (parties cannot contract "to confer jurisdiction on a court [when] such jurisdiction is statutorily precluded"). Although § 52-418 is a state statute, it is relevant to note that federal courts are divided on that issue. Compare *Bowen* v. *Amoco Pipeline Co.,* 254 F.3d 925, 936-37 (10th Cir.2001) (holding that parties may not contract to expand judicial review of arbitration awards beyond grounds authorized by Federal Arbitration Act and noting that Seventh and Eighth Circuit Courts of Appeals have suggested in dicta that "they too would reject contractually expanded standards") with *Lapine Technology Corp.* v. *Kyocera Corp.,* 130 F.3d 884, 889 (9th Cir. 1997) ("[f]ederal courts can expand their review of an arbitration award beyond the [Federal Arbitration Act's] grounds, when . . . the parties have so agreed"), and *Gateway Technologies, Inc.* v. *MCI Telecommunications Corp.,* 64 F.3d 993, 996-97 (5th Cir. 1995) (parties' agreement to permit expanded judicial review of arbitration award by federal courts was "acceptable"). Moreover, even if it were clear that parties could contract for expanded judicial review of punitive damage awards, I do not understand how a court would conduct that review, if, as the majority concludes, the principles of *Gore* do not apply to the arbitral forum. For all of the foregoing reasons, I submit that it is the so-called "more likely alternative" advanced by the majority that is the "speculative" one. Footnote 14 of the majority opinion.

*of Firefighters, AFL-CIO, Local 998,* 248 Conn. 108, 127, 728 A.2d 1063 (1999) (Connecticut has "strong public policy favoring arbitration as an alternative method of dispute resolution"); see also *Garrity* v. *McCaskey,* supra, 223 Conn. 7; *Paranko* v. *State,* 200 Conn. 51, 56-57, 509 A.2d 508 (1986); *Bridgeport* v. *Bridgeport Local 1159,* 183 Conn. 102, 107, 438 A.2d 1171 (1981).

For all of the foregoing reasons, I would hold that Connecticut case law governing the award of punitive damages under the common law and CUTPA, together with the United States Supreme Court's decision in *Gore,* supports the conclusion that the state has a well-defined and dominant public policy against grossly excessive punitive damage awards. In order to determine whether a punitive damage award issued by an arbitration panel violates that policy, I would apply the three guideposts set forth in *Gore,* as further illuminated in *State Farm Mutual Automobile Ins. Co.* v. *Campbell,* 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). In my view, such an approach would provide the courts with a principled and efficient method for identifying awards that exceed acceptable bounds, while respecting the substantial deference that we traditionally afford arbitrators' decisions. See, e.g., *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO,* 271 Conn. 127, 134, 855 A.2d 964 (2004). I therefore turn my attention to an application of the three guideposts to the facts of the present case.

This case involves an ordinary contract dispute between two private parties. The defendant's misconduct implicated only economic harm and did not pose a risk to the health and safety of others. See *State Farm Mutual Automobile Ins. Co.* v. *Campbell,* supra, 538 U.S. 419 (in

assessing reprehensibility of defendant's conduct, courts should consider whether "the harm caused was physical as opposed to economic"). Furthermore, the fact that our legislature has limited punitive damages in product liability cases to twice the amount of compensatory damages awarded; see General Statutes § 52-240b; even though the conduct that forms the basis of the compensatory damage award in such cases often entails risk to the physical well-being of consumers, supports the conclusion that the award in this commercial dispute is grossly excessive.

With respect to the second guidepost, the ratio of punitive damages to compensatory damages, the United States Supreme Court has stated that there is no "bright-line ratio which a punitive damages award cannot exceed. . . . [I]n practice [however], few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Automobile Ins. Co.* v. *Campbell,* supra, 538 U.S. 425. In the present case, it suffices to note that the ratio is infinite because the plaintiff could not prove to the arbitrators' satisfaction that it had suffered even nominal damages.

The third guidepost, which directs us to consider "the disparity between the punitive damages . . . and the civil penalties authorized or imposed in comparable cases"; (internal quotation marks omitted) id., 428; also supports the conclusion that the punitive damage award in the present case is grossly excessive. The maximum civil penalty authorized by the legislature for the defendant's CUTPA violation is $5000. See General Statutes § 42-110o(b). The $5 million punitive damage award issued against the defendant exceeds that amount by a factor of

1000. It also is nearly fifteen times greater than the highest award issued in a business dispute that did not entail an ongoing pattern of misconduct, that is, $340,000. See *Fabri* v. *United Technologies International, Inc.*, supra, 387 F.3d 126. In short, all three guideposts suggest that a $5 million punitive damage award under the circumstances of this case is grossly excessive and, therefore, should be vacated.

Finally, it is relevant to note that other courts have applied the *Gore* guideposts even when the defendant does not claim that a punitive damage award violates his or her due process rights, but merely contends that it is excessive. See, e.g., *Lee* v. *Edwards*, 101 F.3d 805, 809 (2d Cir. 1996) (finding that *Gore* "should assist . . . in the application of [the] standard by which [a court] deem[s] excessive a punitive damage award that 'shocks [the] judicial conscience' "). In fact, courts have applied the principles of *Gore* within the specific context of an arbitration award. Of particular significance is *Sawtelle* v. *Waddell & Reed, Inc.*, supra, 304 App. Div. 2d 103, in which the Appellate Division of the Supreme Court of New York applied the guideposts to vacate a $25 million punitive damage award under CUTPA on the ground that the arbitration panel had manifestly disregarded the law. Id., 111-14. The court stated that "*Gore* is not only applicable to due process analysis of a punitive damage award but also provides a guide for determining whether such an award is irrational." Id., 110. Upon application of the guideposts, the court concluded that the award ran afoul of *Gore* because: (1) the defendant's conduct was not sufficiently egregious to warrant a $25 million punitive damage award; id., 111; (2) the "award dwarf[ed] the total compensatory damages by a factor of [twenty-three]"; id.; and (3) the amount of

the award was "vastly out of proportion" to the civil penalties authorized by statute and the punitive damages awarded in comparable cases. Id., 112; cf. *Sanders* v. *Gardner,* 7 F. Sup. 2d 151, 176-79 (E.D.N.Y. 1998) (applying *Gore* guideposts, concluding that arbitrators had not manifestly disregarded law in awarding $10 million in punitive damages against securities broker-dealer, and noting that *Gore* and its progeny "help illustrate the relevant analysis of excessiveness of punitive damages").

To summarize, I would conclude that Connecticut has a well-defined and dominant public policy against grossly excessive punitive damages. Because I believe that the award in the present case violates that policy and compromises the integrity of the arbitration process, I would remand the case to the trial court with direction to vacate the award. In light of that disposition, I would not reach the issue that the majority addresses in part II of its opinion, namely, whether the trial court improperly declined to award the plaintiff interest on the arbitration award.

Accordingly, I respectfully dissent.

**SUPREME COURT**

**STATE OF CONNECTICUT**

**NO. AC 24719**

**MEDVALUSA HEALTH PROGRAMS, INC.**

**V.**

**MEMBERWORKS, INC. : DECEMBER 17, 2003**

**ORDER**

THE MOTION OF THE DEFENDANT, FILED OCTOBER 28, 2003, TO TRANSFER APPEAL, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **GRANTED**. SEE ENCLOSED LETTER FOR FURTHER INFORMAITON.

BY THE COURT,

/s/ Michèle T. Angers
CHIEF CLERK

NOTICE SENT: DECEMBER 18, 2003
ZELDES, NEEDLE & COOPER, P.C.
BRODY, WILKINSON & OBER, P.C.
WIGGIN & DANA, LLP

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| DOCKET NO. CV 02-0821887S | : | SUPERIOR COURT |
| MEDVALUSA HEALTH PROGRAMS, INC. | : | JUDICIAL DISTRICT OF HARTFORD |
| VS. | : | AT HARTFORD |
| MEMBERWORKS, INCORPORATED | : | MAY 22, 2003 |

## MEMORANDUM OF DECISION

I.

The plaintiff, MedvalUSA Health Programs, Inc. (Medval), a corporation formed to provide membership programs in the health care industry has filed this suit against the defendant, Memberworks, Inc. (Memberworks), a Connecticut corporation which provides membership programs that give consumers access to preferred pricing on a variety of products and services in areas such as health, finance and entertainment. On or around February 9, 1998, the parties entered into an agreement pursuant to which Medval agreed to become a wholesale vendor of one of Memberworks' dental and health plans. The parties amended their agreement on April 15, 1999, by modifying several of Memberworks' contractual obligations. The relationship between the parties deteriorated and, on September 13, 2000, Medval filed a demand for arbitration with the American Arbitration Association asserting three counts: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA). On December 13, 2002, after 18 days of hearings, the arbitration panel ruled in favor of Medval on all counts but awarded no compensatory damages, concluding that Medval had not

proved damages to the degree of certainty required by Connecticut law.[1] The panel did award, however, punitive damages, pursuant to CUTPA, in the amount of $5 million, as well as attorney's fees in the amount of $387,794 and arbitration costs in the amount of $70,950.

On December 18, 2002, Medval moved to confirm the arbitration award on the ground that Connecticut courts have always paid great deference to arbitration awards. On January 10, 2003, Memberworks moved to vacate the award asserting that (1) the award is in violation of Connecticut's well defined public policy, embodied in the due process clause of the fourteenth amendment to the constitution of the United States, against grossly excessive punitive damage awards; (2) that the award violates the public policy against awarding punitive damages under CUTPA in the absence of reckless, intentional or wanton conduct;[2] and (3) that the excessive amount of the award evidences a manifest' disregard or an egregious or patently

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[1] As noted by Medval, during the course of the 18 day proceeding, "the parties engaged in opening and closing arguments, submitted approximately 600 exhibits, presented testimony from ten witnesses, generated a transcript of 3,321 pages, and submitted posthearing briefs, reply briefs, supplemental briefs and detailed time lines exceeding 250 pages of discussion, analysis and argument."

[2] While Medval, in its briefs, responds to three separate public policy grounds for vacatur allegedly asserted by Memberworks, the third of these, "the public policy that prohibits the imposition of CUTPA liability absent a showing that plaintiff suffered an ascertainable loss"; (Medval's Brief, p. 10); is not addressed herein because while Memberworks references this argument in its brief (Memberworks' Brief, p. 39), it is not enumerated as one of its grounds for vacatur in its Motion to Vacate.

irrational application of the law in violation of General Statutes § 52-418(a)(4).[3]

II

The legal principles governing judicial review of arbitral awards are well settled. "This court has declared on numerous occasions that arbitration is a creature of contract, whereby the parties themselves, by agreement, define the powers of the arbitrators. . . . [W]hen the parties have established the authority of the arbitrator, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . When the parties have not restricted the scope of the arbitrator's authority, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission." (Citations omitted; internal quotation marks omitted.) *Schoonmaker v. Cummings & Lockwood*

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[3] Section 52-418(a) provides, in its entirety: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party has been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

Pursuant to *Garrity v. McCaskey*, 223 Conn. 1, 7-8, 612 A.2d 742 (1992), Connecticut recognizes that subpart (4) encompasses the manifest disregard of the law doctrine.

*of Connecticut, P.C.*, 252 Conn. 416, 426-7, 747 A.2d 1017 (2000). "Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of dispute resolution." (Internal quotation marks omitted.) *Saturn Construction Co. v. Premier Roofing Co.*, 238 Conn. 293, 304, 680 A.2d 1274 (1996). "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the construction placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved." (Internal quotation marks omitted.) *Stratford v. International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 115, 728 A.2d 1063 (1999).

These well established principles of deference to the arbitral process are, however, subject to certain exceptions where the court will "conduct a more searching review of arbitral awards." *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 428. Our Supreme Court has recognized three grounds for vacating an arbitral award: "'(1) the award rules on the constitutionality of a statute: *Caldor, Inc. v. Thornton*, 191 Con. 336, 344, 464 A.2d 785 (1983), aff'd, 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985); (2) the award violates clear public policy; *Watertown Police Union Local 541 v. Watertown*, 210 Conn. 333, 339, 555 A.2d 406 (1989); or (3) the award contravenes one or more of the statutory proscriptions of § 52-418(a). *Carroll v. AETNA Casualty & Surety Co.*, [189 Conn. 16, 22-23, 453 A.2d 1158 (1983)].' The judicial

recognition of these grounds for vacatur evidences a willingness, in limited circumstances, to employ a heightened standard of judicial review of arbitral conclusions, despite the traditional high level of deference afforded to arbitrators' decisions when made in accordance with their authority pursuant to an unrestricted submission." Id., quoting *Garrity v. McCaskey*, supra, 223 Conn. 6.

The arbitration clause entered into between the parties provides, in relevant part: "[A]ny dispute arising out of or relating to this Agreement, including any issues relating to arbitrability or the scope of this arbitration clause, will be finally settled by arbitration in accordance with the rules of the American Arbitration Association and the United States Arbitration Act and judgment upon the award rendered by the arbitrator(s) may be entered by any court with jurisdiction." In the present case, it is not disputed that the arbitration submission is unrestricted. As such, this court's review of the arbitration award is limited to determining whether it contravenes any of the three recognized grounds for vacatur promulgated by our Supreme Court and set forth above.

A.

Public Policy Exception

Our Supreme Court recognizes an exception to the generally deferential and limited judicial review of an arbitrator's decision when it is claimed that an arbitration award violates a legitimate and clearly established public policy. The public policy exception has been characterized as "exceedingly narrow [in] scope" and de novo review will not flow automatically from a party merely raising the specter of a public policy violation. See *Schoonmaker v.*

*Cummings & Lockwood of Connecticut, P.C.* supra, 252 Conn. 438

"[A] party raising such a challenge to an arbitral award may not succeed in receiving de novo review merely by labeling its challenge as falling within the public policy exception to the normal rule of deference. The substance, not the form, of the challenge will govern. Thus, the court should not afford de novo review of the award without first determining that the challenge truly raises a legitimate and colorable claim of violation of public policy. If it does raise such a claim, de novo review should be afforded. If it does not, however, the normal deferential scope of review should apply." Id., 429 n.7. "[T]he narrowness of the public policy exception continues to be in force. . . . [and] for the plaintiff to prevail on this claim, he must demonstrate that [the award] clearly contravenes an established and dominant public policy." Id., 438. The public policy invoked by a party seeking to vacate an award must be "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, the plaintiff can prevail . . . only if it demonstrates that the [arbitrator's] award clearly violates an established public policy mandate." (Internal quotation marks omitted.) *State v. AFSCME, AFL-CIO, Council 4, Local 2663*, 257 Conn. 80, 90-91, 777 A.2d 169 (2001). Only "where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does

in fact violate public policy." *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 429.

1.

Excessiveness of Punitive Damage Award

Memberworks argues that the arbitration award violates the public policy against grossly excessive punitive damage awards, embodied in the due process clause of the fourteenth amendment to the United States constitution.

In support of its argument that there exists a well defined and dominant public policy against grossly excessive punitive damage awards, Memberworks cites the United States Supreme Court case of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), which requires that any punitive damage award must be (1) commensurate with the reprehensibility of the conduct at issue; (2) proportionate to the compensatory damages; and (3) consistent with the statutory penalties that exist for the conduct being punished. Id., 575-77, 580.

In *Gore*, the plaintiff/appellee brought suit against BMW under Alabama's unfair trade practices statute after he discovered that the "new" car he purchased had been repainted. The jury awarded him $4,000 in compensatory damages and $4 million in punitive damages, which the Alabama Supreme Court subsequently reduced to $2 million. The United States Supreme Court held that the remittitur award of $2 million was grossly excessive and violated BMW's right to due process. The specific issue was whether the award was sufficiently excessive to constitute a violation of the due process clause of the

fourteenth amendment to the United States constitution, which "prohibits *a State* from imposing a 'grossly excessive' punishment on a tortfeasor." (Emphasis added.) Id., 562. Memberworks asserts that, pursuant to the Connecticut Supreme Court's decision in *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 416, it is entitled to de novo review of the award because it has asserted a legitimate and colorable claim that the award violates public policy.

Medval counters that Memberworks' reliance on *Gore* is misplaced and that de novo review is not warranted because the alleged public policy which is derived from the due process clause of the fourteenth amendment, does not apply to private consensual arbitration. In assessing the applicability of *Gore* to the present case, it is important to recognize that BMW was challenging an award originally imposed by *a jury* and subsequently remitted by *a court*. "'That an action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.' *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 92 L. Ed 1161 [1948]." *Lockwood v. Killian*, 179 Conn. 62, 75, 425 A.2d 909 (1979). It is axiomatic that "state action . . . [is] an essential requirement for invocation of the due process clauses of both our federal and state constitutions. . . . " (Citations omitted.) *Savage v. Aronson*, 214 Conn. 256, 284, 571 A.2d 696 (1990); see also *U.S. v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 146 L. Ed. 2d 658 (2000).

Medval is accurate in its assertion that Memberworks' reliance on *Gore* is misplaced. *Gore* does not support the existence of a clearly established public policy against

grossly excessive punitive damage awards in the arbitral forum.

In a private arbitral proceeding where the parties have voluntarily consented to resolve their dispute outside the state-sponsored judicial framework, there is no state action.[4] Though never expressly stated by the Connecticut Supreme Court, this principle is well settled in other jurisdictions. "[T]here is ample authority for the proposition that a private arbitration does not implicate due process concerns since, where the parties have voluntarily participated in the arbitration process, there is no state action involved, not even in the judicial confirmation of the award." *Sawtelle v. Waddell & Reed, Inc.*, 2003 WL 288471 (N.Y.A.D. 1 Dept.); see also *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191 (11th Cir. Fla. 1995); *Sanders v. Gardner*, 7 F. Sup. 2d 151, 174-75 (E.D.N.Y. 1998).[5]

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[4] "Voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of right, but similar restriction or deprivation, if compelled by government, must accord with procedural and substantive due process.... To insulate statutorily mandated arbitration awards from judicial review for errors of law creates the anomaly that, without the consent of the parties, arbitrators are empowered to disregard the law in deciding issues affecting substantial rights.... The case is different where the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks of and waived objection to that decision." *General Accident Ins. Co. v. McGee*, 33 Conn. App. 626, 629, 637 A.2d 792 (1994).

[5] While it is not greatly disputed that the arbitral process itself does not constitute state action, there is some disagreement as to whether the judicial proceeding confirming or vacating the arbitration award implicates state action. Some courts roundly reject the proposition that the confirmation or an arbitration award constitutes state action. See, e.g., *Davis v. Prudential Securities, Inc.*, supra, 59 F.3d

(Continued on following page)

In the present case, Memberworks is challenging an award rendered through private, consensual arbitration in which no state action is involved. As such, the award is not subject to due process scrutiny and cannot be vacated on grounds derived solely from constitutional principles. In its briefs, Memberworks cites cases from various jurisdictions purported to support its argument that a public policy against excessive punitive damages should be recognized in the present case. Virtually every case cited in which a punitive damage award was reviewed for excessiveness involved either a jury or court issued punitive damage award, not an award rendered through

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1186 (holding that "the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause"); *Sawtelle v. Waddell & Reed, Inc.*, supra, 2003 WL 288471. Other courts have been willing to recognize that the confirmation of an arbitration award involves a "limited degree of state action" that requires some measure of due process protection. See *Rifkind & Sterling, Inc. v. Rifkind*, 28 Cal. App. 4th 1282 (Cal. App. 2d. Dist. 1994) (holding that "[o]nly a limited degree of state action is involved in confirming an arbitration award"). Still other courts have declined to specifically address the issue but have nevertheless demonstrated a recognition of a potential dichotomy between the arbitral and judicial proceedings. See *Commonwealth Associates v. Letsos*, 40 F. Sup. 2d 170 (S.D.N.Y. 1999) (stating that "[w]hile the procedures utilized in private arbitration do not constitute state action . . . the application of the coercive power of a court to confirm and enforce an arbitration award arguably is another matter"); *Glennon v. Dean Witter Reyolds, Inc.*, 83 F.3d 132 (6th Cir. Tenn. 1996) (determining that, without deciding whether due process protections attached to an arbitral award, the manifest disregard of the law standard provided meaningful judicial review of the punitive damage award). While these divergent views provide interesting fodder for law review articles and footnotes in judicial opinions, the weight of authority at the present time is consistent with the view in *Sawtelle v. Waddell & Reed, Inc.*, supra, that neither the arbitral process itself nor the confirmation proceeding involve state action.

arbitration where state action is lacking.[6] There is one Connecticut Superior Court decision, *Hadelman v. DeLuca*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 97 0060279 (November 25, 20002, *Alander, J.*), in which the court granted de novo review of an arbitration award. The narrow issue before the court was whether to conduct a de novo review of the arbitrator's decision in view of the defendant's contention that the award violates, inter alia, the public policy prohibiting the

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[6] See, e.g., *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) (jury award); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993) (jury award); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) (jury award); *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. N.Y. 1997) (judge award); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. Conn. 1996) (jury award); *Blackledge v. Carlone*, 126 F. Sup. 2d 224, 229 (D. Conn. 2001) (jury award); *United Techs. Corp. v. Am. Home Assurance Co.*, 118 F. Sup. 2d 174, 179 (D. Conn. 2000) (judge award); *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Sup. 2d 109, 115 (D. Conn. 2000) (jury award).

But see, *Sawtelle v. Waddell & Reed, Inc.*, supra, where the Appellate Division entertained cross appeals from an order and judgment of a lower court and denied the respondent's motion to vacate the award of punitive damages. Recognizing that private, consensual arbitration is not tantamount to state action and, therefore, does not implicate due process concerns, the court nevertheless concluded that the *Gore* test is not only applicable to due process analysis of a punitive damage award but also "provides the appropriate standard in determining the excessiveness of an arbitration award of punitive damages under FAA review." The court rejected the petitioner's argument that *Gore* pertains only to due process claims and reasoned that "[a]lthough under a due process analysis, *Gore* established the constitutional limits on the imposition of punitive damages, *Gore* has been applied in cases where it is alleged merely that the damages are 'grossly excessive.'" Indeed, some cases have recognized that the *Gore* test has application beyond due process challenges and provides a guide for assessing whether a punitive damage award is excessive or irrational. See e.g., *Lee v. Edwards*, supra, 101 F.3d 805; *Sanders v. Gardner*, supra, 7 F.Sup.2d 151.

imposition of grossly excessive punitive damages, contained in the due process clause of the fourteenth amendment to the United States constitution. Notwithstanding that the punitive damage award at issue was rendered in the course of private consensual arbitration, Judge Alander determined, in reliance on *Gore* and its progeny, that the constitutional prohibition on grossly excessive punitive damages "constitutes a dominant and clear public policy for purposes of de novo review of an arbitrator's decision." Judge Alander concluded that "[t]he defendants have raised sufficient issues to warrant a de novo review of whether the arbitrators inappropriately exercised their judgment and imposed grossly excessive punitive damages in violations of the constitution."

While this decision is well reasoned and could surely be followed, it has been brought to this court's attention that Judge Alander recently ordered counsel for both parties to brief the issue of the applicability of *Gore* inasmuch as the arbitration did not involve state action. This issue was not before that court when the matter was originally argued.

For the foregoing reasons, it is the conclusion of this court that Memberworks has failed to demonstrate that Connecticut recognizes a "clearly established public policy" prohibiting excessive punitive damage awards in the arbitral forum.

2.

Imposition of Punitive Damages
Without Sufficient Evidence

Memberworks further moves to vacate the award on the ground that it contravenes the public policy against

imposing punitive damages pursuant to CUTPA in the absence of a specific finding by the panel of reckless indifference to or intentional or wanton violation of the rights of others.

Medval counters that the established rule in Connecticut with respect to arbitral awards is that, unless required by the submission itself, the panel's decision need not contain any more than the actual decision and need not make reference to any specific claims of the parties. Medval argues that there exists no "well defined and dominant public policy" requiring arbitrators to state the specific ground for their award.

Medval is accurate in its assertion that there exists no public policy requiring specific words to be used in an arbitral award. To the contrary, it has long been established that arbitrators are not required to disclose the basis or reasoning upon which their awards are made. See, e.g., *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 82 S. Ct 1318, 8 L. Ed. 2d 462 (1962); *Kurt Orban Co. v. Angeles Metal Systems*, 573 F.2d 739 (2d Cir. N.Y. 1978); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. N.Y. 1972). "A court, therefore, need only infer from the facts of the case the grounds for the arbitrator's decision, even where tenuous at best." *Sanders v. Gardner*, supra, 7F. Sup. 2d 159, quoting *United Paperworkers International Union v. Misco., Inc.*, 484 U.S. 29, 108 S. Ct. 364, 8 L. Ed. 2d 286 (1987).

While Connecticut law may require that, in order to award punitive damages under CUTPA, the evidence must reveal reckless indifference to or intentional or wanton violation of the rights of others, Memberworks has directed this court to no authority requiring that an

arbitration panel expressly enumerate its reasoning in the award. While evidentiary limitations on CUTPA damages may very well be part of the well defined and dominant public policy of the state, the essential inquiry is whether there exists a public policy requiring arbitrators to expressly detail the basis of their awards. Because the panel was not required to explain the basis of its award, the mere fact that the award does not specifically state that the conduct was reckless, wanton, or intentional does not necessarily reveal an inconsistency will with any alleged public policy with respect to CUTPA punitive damages.

Nevertheless, even if public policy required the panel to make specific findings of recklessly indifferent, intentional or wanton violation of the rights of others, a review of the award issued by the panel reveals that it indeed made such findings. The panel took pains to detail conduct it characterized as "illustrative of [Memberworks'] unfair and deceptive behavior."[7] Therefore, the panel's award was

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[7] The panel cited 11 specific instances of Memberworks' conduct that it characterized as "illustrative of its unfair and deceptive behavior:

Respondent's failure to inform Claimant that it had contracted with the CorVal network, and Respondent's failure to offer the CorVal network to Claimant;

Respondent's failure to candidly, accurately and fully disclose to Claimant the nature of its communications with UNV regarding UNV's position on updating its provider lists, and failure to arrange for Claimant to participate in discussions on the subject with UNV and Respondent;

Respondent's assertion to Claimant that Respondent was not obliged to deliver to Claimant provider lists for all states, when the contract was clearly and unambiguously to the contrary;

Respondent's history of repeatedly misrepresenting its obligations under its agreements with Claimant;

(Continued on following page)

replete with "evidence . . . [to] reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights." *Gargano v. Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987).

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The refusal of Memberworks employee Andrew Siegel, following his replacement of Mr. Donner as the senior employee of Respondent who was responsible for Claimant's account to meet with Claimant in a timely manner, as well as Respondent's refusal at various times, for extended periods of time, to communicate with Claimant except in writing. Respondent's fear of a possible lawsuit by Claimant does not excuse the performance of its duties under the contract and under the implied covenant of good faith and fair dealing;

Respondent's failure to inform Claimant that it had contracted with the Beech Street Network and Respondent's failure to offer the Beech Street network to Claimant;

Respondent's preparation and distribution of a materially inaccurate summary of a meeting with Claimant;

Respondent's failure to advise Claimant on a timely basis of the notification which Respondent has received from UNV's principals that they had sold their interests in certain network companies, leaving 'uncertain' after ninety days the Claimant's access to UNV's physician and hospital network and suggesting that Respondent consider 'coverage alternatives other than through UNV' for Claimant's enterprise;

Respondent's imposition of conditions on its provision of contractually mandated support services, when the contract provided for no such conditions;

The refusal of Respondent's Mr. Iannucci to make himself sufficiently available for conference calls; his prohibition of non-written communications with Claimant; his failure to respond adequately and fairly to Claimant's requests for information; his failure to timely approve hospital lists for advertising; his failure to respond to Claimant's multiple inquiries about Claimant's elimination of free dental services from Claimant's program;

Respondent's refusal to provide timely and adequate notice of the threatened elimination from Claimant's program of free dental service; and Respondent's failure to provide Claimant with new fulfillment materials necessitated by such elimination."

In addition, even if the panel was required to make specific evidentiary findings *and* if this court were not persuaded that the award manifested such findings, Memberworks would still not have a valid ground for vacatur. Throughout its briefs, Memberworks attempts to couch its objection to the punitive damage award as a "public policy argument." Memberworks' claim that the award does not make the necessary evidentiary findings required by CUTPA jurisprudence is more accurately characterized as a claim of an error of law and its attempt to characterize it as a public policy argument simply fails. The essence of the allegation is that the panel failed to properly apply the law with respect to specifically enumerating the reasoning behind its findings. An allegation that an arbitrator misapplied the law is the very definition of an error of law. See *Lathuras v. Shoreline Dental Care, LLC*, 65 Con. App. 509, 516, 783 A.2d 83 (2001).

"The well established general rule is that [w]hen the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission." (Citation omitted; internal quotation marks omitted.) *State v. AFSCMS, AFL-CIO, Council 4, Local 2663*, supra, 257 Conn. 84. Therefore, even if Memberworks could show that the panel's award was erroneous because of a failure to find Memberworks' conduct to be reckless, intentional or wanton, which this court holds it cannot show, the award would not be subject to vacatur.

B.

Manifest Disregard of the Law

Memberworks finally moves for vacatur, pursuant to § 52-418(a) (4), on the ground that the panel's award "manifests an egregious or patently irrational application of the law." Specifically, Memberworks argues that the amount of the punitive damage award is so excessive and "marks such a radical departure from well established standards for imposing punitive damages and the statutory requirements of CUTPA that it is truly in 'manifest disregard' of the law, and should be vacated."

In analyzing this argument, this court is mindful of the extraordinarily narrow scope of review for manifest disregard and that this ground should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. See *Garrity v. McCaskey*, supra, 223 Conn. 10. Manifest disregard of the law clearly means more than error or misunderstanding with respect to the law. "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . Judicial inquiry under the 'manifest disregard' standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." Id., 8-9. Indeed, our Supreme Court has noted that this ground should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to

established legal principles such as when "the memorandum of an arbitrator revealed that he had reached his decision by consulting a Ouija board" or "the memorandum patently discloses an infidelity to the obligation imposed upon the arbitrators." *Garrity v. McCaskey*, supra, 8.

The Supreme Court has promulgated a three part test, the elements of which must be satisfied in order for a court to vacate the award on manifest disregard grounds: "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable." *Saturn Construction Co. v. Premier Roofing Co.*, supra, 238 Conn. 305.

Memberworks has failed to satisfy any of the three elements of this test. The "clearly governing legal principle" alleged to be at issue is that the panel was limited in the amount of punitive damages it could award. As discussed previously, Memberworks has provided no authority for the existence of a clearly applicable legal principle limiting the amount of punitive damages that can be awarded in consensual arbitration.[8]

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[8] Memberworks cites to the New York Appellate Division case of *Sawtelle v. Waddell & Reed, Inc.*, supra, 2003 WL 288471, issued February 11, 2003, in support for its motion to vacate under the manifest disregard of the law standard. In *Sawtelle*, the Appellate Division determined that the arbitration panel's award of $25 million in punitive damages demonstrated that "the panel completely ignored applicable law [and] provides a separate basis for vacating the award." In reaching the conclusion, the court was guided by several important

(Continued on following page)

Moreover, even if there existed a clearly governing legal principle, Memberworks has failed to demonstrate that the panel appreciated the existence of this principle but decided to ignore it. It is well settled that an arbitration award will not be vacated simply because of an error or misunderstanding with respect to the law. See *Garrity v. McCaskey*, supra, 223 Conn. 9. Rather, only where the error is "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator ... [and] the arbitrator appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it," will manifest disregard be found. See *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), cert denied, 522 U.S. 1049, 118 S. Ct. 695, 139 L.Ed.2d 639 (1997). In *Saturn Construction Co. v. Premier Roofing Co.*, supra, 238 Conn. 293, the court determined that even if the legal

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findings. As a preliminary matter, the court readily accepted the "requirement that punitive damages be proportional to compensatory damages" and found that "both sides agreed on this well-settled rule of proportionality and the panel was specifically advised of its existence." Id. Thus, the court provided the foundation necessary to conclude that (1) there exists a clearly governing legal principle with respect to limitations on punitive damage awards in private arbitration and (2) that the panel was aware of but decided to ignore this principle. As discussed herein, Memberworks has not demonstrated either of these factors to the court's satisfaction.

Furthermore, while the *Sawtelle* decision is of very recent vintage, this court is not bound by its interpretation of the manifest disregard exception. In view of the fact that the Connecticut Appellate Courts have not yet embraced an approach to the manifest disregard of the law standard that encompasses an excessive punitive damage award, and in recognition that this exception has routinely been characterized as exceedingly narrow in scope, this court is unwilling to unilaterally expand its breadth to include the claim of mere excessiveness advanced by Memberworks.

principle at issue was well defined, explicit and clearly applicable to the facts, it "could not conclude . . . that the arbitration panel appreciated but ignored it. There is no evidence in the record that the plaintiff ever made this argument before the arbitration panel." Id., 308. Moreover, "[t]o prevail on its application to vacate an arbitration award pursuant to § 52-418(a)(4), a party must show that the arbitrator knew that her award was contrary to the law." *Lathuras v. Shoreline Dental Care, LLC*, supra, 65 Conn. App. 515. Memberworks has neither delineated a clearly governing legal principle nor demonstrated that the panel was made aware of it or knowingly disregarded it.

Furthermore, the cases that have interpreted the manifest disregard standard seem to apply it only to clearly governing principles of substantive law, such as a statutes of limitations; *Garrity v. McCaskey*, supra, 223 Conn. 1; or mitigation of damages principles; *Lathuras v. Shoreline Dental Care, LLC*, supra, 65 Conn. App. 509. In the present case, Memberworks' argument is based merely on the *amount* of the damages awarded and not on any substantive legal principles underlying the arbitrators' authority to award such damages. The amount of a damage award is not appropriately characterized as a substantive legal issue. This court is not aware of, nor did Memberworks direct the court's attention to, any authority suggesting that there exist substantive legal principles restricting the amount of a punitive damages that can be awarded in a consensual arbitration proceeding. In awarding damages, the arbitrator, like a judge in a court proceeding, engages in a discretionary analysis of competing factors. "Submitting the issue of damages to the arbitrator without a limitation . . . gave the arbitrator the power 'to

exercise his own judgment and discretion and to render an appropriate award of damages.'" *Zavaski v. World Wide Financial Services of Central Connecticut, Inc.*, Superior Court, judicial district of Middlesex, Docket No. CV 69853 (October 15, 1993, *Arena, J.*), quoting *Board of Education v. Waterbury Teachers' Assn.*, 174 Conn. 123, 128, 384 A.2d 350 (1977). The notion that an arbitration panel's exercise of discretion in awarding damages does not involve substantive legal principles was embraced in *Board of Education v. New Haven*, Superior Court, judicial district of New Haven, Docket No. CV 96 0390191 (September 9, 1996, *Hodgson, J.*) (17 Conn. L. Rptr. 505). The court recognized the broad discretion afforded arbitration panels in the nature and extent of their awards. The court stated: "[s]ince the arbitrators had discretion to fashion a remedy and were not required to order any particular remedy, this court cannot conclude that the exercise of that discretion reflected a manifest disregard for applicable law. . . . It must be remembered that the arbitrators were not adjudicating a provision of law, such as a civil service ordinance, that required a particular remedy as a matter of law; rather, they were arbitrating a claimed breach of contract with a range of possible remedies to consider." Id. Therefore, it seems that the manifest disregard standard is applied only with respect to substantive principles of law and is not an appropriate procedural vehicle for a challenge to the amount of a punitive damage award.

For the foregoing reasons, it is the conclusion of this court that Memberworks has failed to demonstrate that the punitive damage award was so excessive as to be in manifest disregard of the law.

## CONCLUSION

Memberworks' motion to vacate is hereby denied and Medval's motion to confirm is granted.

/s/ Berger
Berger, J.

**AMERICAN ARBITRATION ASSOCIATION**
**Commercial Arbitration Tribunal**

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**RE: 12 Y 193 00319 00**

**In the Matter of the Arbitration between**

**MedValUSA Health Programs, Inc., (Claimant)**

**and**

**MemberWorks, Inc., (Respondent)**

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## AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties of February 9, 1998; having been duly sworn; and having duly heard the proofs and allegations of the Parties, do hereby make the following award:

As to Claimant's First Count (breach of contract), we find for the Claimant as to liability, but award the Claimant no damages, as Claimant has not established them with reasonable certainty.

As to the Claimant's Second Count (breach of the implied covenant of good faith and fair dealing), we again find for the Claimant as to liability, but award Claimant no damages, as Claimant has not established them with reasonable certainty.

As to the Claimant's Third Count (violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq.) we find for the Claimant as to liability. We find that Respondent's conduct was unfair and deceptive.

We find that the following actions of the Respondent are illustrative of its unfair and deceptive behavior:

> Respondent's failure to inform Claimant that it had contracted with the CorVel network, and Respondent's failure to offer the CorVel network to Claimant;
>
> Respondent's failure to candidly, accurately and fully disclose to Claimant the nature of its communications with UNV regarding UNV's position on updating its provider lists, and failure to arrange for Claimant to participate in discussions on the subject with UNV and Respondent;
>
> Respondent's assertion to Claimant that Respondent was not obliged to deliver to Claimant provider lists for all states, when the contract was clearly and unambiguously to the contrary;
>
> Respondent's history of repeatedly misrepresenting its obligations under its agreements with Claimant;
>
> The refusal of Memberworks employee Andrew Siegel, following his replacement of Mr. Donner as the Senior employee of Respondent who was responsible for Claimant's account, to meet with Claimant in a timely manner, as well as Respondent's refusal at various times, for extended periods of time, to communicate with Claimant except in writing. Respondent's fear of a possible lawsuit by Claimant does not excuse the performance of its duties under the contract and under the implied covenant of good faith and fair dealing;
>
> Respondent's failure to inform Claimant that it had contracted with the BeechStreet network,

and Respondent's failure to offer the BeechStreet network to Claimant;

Respondent's preparation and distribution of a materially inaccurate summary of a meeting with Claimant;

Respondent's failure to advise Claimant on a timely basis of the notification which Respondent had received from UNV's principals that they had sold their interests in certain network companies, leaving "uncertain" after ninety days the Claimant's access to UNV's physician and hospital network, and suggesting that Respondent consider "coverage alternatives other than through UNV" for Claimant's enterprise;

Respondent's imposition of conditions on its provision of contractually mandated support services, when the contract provided for no such conditions;

The refusal of Respondent's Mr. Iannucci to make himself sufficiently available for conference calls; his prohibition of non-written communications with Claimant; his failure to respond adequately and fairly to Claimant's requests for information; his failure to timely approve hospital lists for advertising; his failure to respond to Claimant's multiple inquiries about Claimant's elimination of free dental services from Claimant's program;

Respondent's refusal to provide timely and adequate notice of the threatened elimination from Claimant's program of free dental services; and Respondent's failure to provide Claimant with new fulfillment materials necessitated by such elimination;

On the Claimant's Third Count we award the sum of FIVE MILLION DOLLARS AND NO CENTS ($5,000,000.00) in punitive damages. The Respondent shall pay the attorneys' fees incurred by Claimant in the amount of $350,957.09, its costs of $36,837.35 and the administrative fees and expenses of the American Arbitration Association, as set forth below.

On the Respondent's counterclaim we find for the Claimant.

The administrative fee of the American Arbitration Association ("the Association") totaling $25,000.00 and the compensation and expenses of the arbitrators totaling $104,855.58 shall be borne by the Respondent. Therefore, the Respondent shall pay to the Claimant the sum of $70,950.00 representing its share of amounts previously advanced to the Association. The Respondent shall also pay to the Association the sum of $11,455.58, representing amounts still due. These amounts reflect all payments made to date.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

| | |
|---|---|
| 12/10/02 | /s/ Robert B. Bellitto |
| Date | Robert B. Bellitto |
| 12/11/02 | /s/ Charles F. Corcoran, III |
| Date | Charles F. Corcoran, III |
| 12/12/02 | /s/ David M.S. Shaiken |
| Date | David M.S. Shaiken |

I, Robert B. Bellitto, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

12/10/02 /s/ Robert B. Bellitto
Date Robert B. Bellitto

I, Charles F. Corcoran, III, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

12/11/02 /s/ Charles F. Corcoran, III
Date Charles F. Corcoran, III

I, David M.S. Shaiken, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

12/12/02 /s/ David M.S. Shaiken
Date David M.S. Shaiken

## CONSTITUTION OF THE UNITED STATES

### AMENDMENT XIV

### AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## Connecticut General Statutes

### TITLE 42. BUSINESS, SELLING, TRADING AND COLLECTION PRACTICES
### CHAPTER 735A. UNFAIR TRADE PRACTICES

### § 42-110b. Unfair trade practices prohibited. Legislative intent

(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.

(c) The commissioner may, in accordance with chapter 54,[1] establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.[2]

(d) It is the intention of the legislature that this chapter be remedial and be so construed.

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**Connecticut General Statutes**

**TITLE 42. BUSINESS, SELLING, TRADING AND COLLECTION PRACTICES**
**CHAPTER 735A. UNFAIR TRADE PRACTICES**

**§ 42-110g. Action for damages. Class actions. Costs and fees. Equitable relief. Jury trial**

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by

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[1] C.G.S.A. § 4-166 et seq.

[2] 15 U.S.C.A. § 41 et seq.

section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this section may, pursuant to rules established by the judges of the Superior Court, bring a class action on behalf of themselves and other persons similarly situated who are residents of this state or injured in this state to recover damages.

(c) Upon commencement of any action brought under subsection (a) of this section, the plaintiff shall mail a copy of the complaint to the Attorney General and the Commissioner of Consumer Protection and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General and the Commissioner of Consumer Protection.

(d) In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. In a class action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees. In any action brought under this section, the court may, in its discretion,

order, in addition to damages or in lieu of damages, injunctive or other equitable relief.

(e) Any final order issued by the Department of Consumer Protection and any permanent injunction, final judgment or final order of the court made under section 42-110d, 42-110m, 42-110o or 42-110p shall be prima facie evidence in an action brought under this section that the respondent or defendant used or employed a method, act or practice prohibited by section 42-110b, provided this section shall not apply to consent orders or judgments entered before any testimony has been taken.

(f) An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.

(g) In any action brought by a person under this section there shall be a right to a jury trial except with respect to the award of punitive damages under subsection (a) of this section or the award of costs, reasonable attorneys' fees and injunctive or other equitable relief under subsection (d) of this section.

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**Connecticut General Statutes**

**TITLE 42. BUSINESS, SELLING, TRADING AND COLLECTION PRACTICES**
**CHAPTER 735A. UNFAIR TRADE PRACTICES**

**§ 42-110o. Civil penalties**

(a) Any person who violates the terms of a temporary restraining order or an injunction issued under subsection (d) of section 42-110d or subsection (a) of

section 42-110m shall forfeit and pay to the state a civil penalty of not more than twenty-five thousand dollars per violation. For purposes of this section the court issuing the injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for recovery of civil penalties.

(b) In any action brought under section 42-110m, if the court finds that a person is wilfully using or has wilfully used a method, act or practice prohibited by section 42-110b, the Attorney General, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than five thousand dollars for each violation. For purposes of this subsection, a wilful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of section 42-110b.

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**Connecticut General Statutes**

**TITLE 52. CIVIL ACTIONS**
**CHAPTER 909. ARBITRATION PROCEEDINGS**

**§ 52-417. Application for order confirming award**

At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order confirming the award. The court or judge shall grant such an order confirming the award unless the

award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419.

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**Connecticut General Statutes**

**TITLE 52. CIVIL ACTIONS**
**CHAPTER 909. ARBITRATION PROCEEDINGS**

**§ 52-418. Vacating award**

(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators. Notwithstanding the time within which the award is required to be rendered, if an award issued pursuant to a grievance taken under a collective bargaining agreement

is vacated the court or judge shall direct a rehearing unless either party affirmatively pleads and the court or judge determines that there is no issue in dispute.

(c) Any party filing an application pursuant to subsection (a) of this section concerning an arbitration award issued by the State Board of Mediation and Arbitration shall notify said board and the Attorney General, in writing, of such filing within five days of the date of filing.

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## Connecticut General Statutes

## TITLE 52. CIVIL ACTIONS
## CHAPTER 909. ARBITRATION PROCEEDINGS

### § 52-421. Record to be filed with clerk of court. Effect and enforcement of judgment or decree

(a) Any party applying for an order confirming, modifying or correcting an award shall, at the time the order is filed with the clerk for the entry of judgment thereon, file the following papers with the clerk: (1) The agreement to arbitrate, (2) the selection or appointment, if any, of an additional or substitute arbitrator or an umpire, (3) any written agreement requiring the reference of any question as provided in section 52-415, (4) each written extension of the time, if any, within which to make the award, (5) the award, (6) each notice and other paper used upon an application to confirm, modify or correct the award, and (7) a copy of each order of the court upon such an application.

(b) The judgment or decree confirming, modifying or correcting an award shall be docketed as if it were rendered in a civil action. The judgment or decree so entered shall have the same force and effect in all respects as, and be subject to all the provisions of law relating to, a judgment or decree in a civil action; and it may be enforced as if it had been rendered in a civil action in the court in which it is entered. When the award requires the performance of any other act than the payment of money, the court or judge entering the judgment or decree may direct the enforcement thereof in the manner provided by law for the enforcement of equitable decrees.

[Attachments Omitted]

**AGREEMENT**

THIS AGREEMENT made this 9th day of February, 1998, between **MemberWorks Incorporated**, with offices located at 680 Washington Boulevard, Stamford, Connecticut, 06901, a Delaware corporation (hereinafter "MW") and **Medsaver Health Programs, Inc.**, with offices located at 26 Borough Drive, West Hartford, Connecticut 06117 a Delaware corporation (hereinafter "MHP"), will set forth and formalize certain items discussed between MW and MHP (the "Parties") in order to clarify discussions between them and to confirm agreement that Connecticut law will govern the terms below.

WHEREAS, MW is a designer and provider of innovative membership service programs supplying services and products,

WHEREAS, MHP is in the business of producing, marketing, and selling discount health care subscriptions (family memberships) for physician, dental, vision, prescription, hearing and/or other medically-related services to the general public, including individuals, corporations, trade groups and associations,

WHEREAS, MW desires to supply its services (hereinafter the "Services") as described in Exhibit A hereto, to MHP customers which Services will be purchased from MW by MHP. The Services will be supplied to MHP customers through the facilities of MW and its marketing partners in cooperation with MHP. Those MHP customers electing to receive MW's Services will be ("Members"). The Services will be supplied to MHP's Members under the name "MedSaver" or other name chosen by MHP and communicated to MW and,

WHEREAS, for the term of this Agreement, MHP is agreeable to offering its customers MW's Services and in granting MW the exclusive, unlimited and unrestricted right to provide Services to Members and further agrees MHP will not enter into any contract to provide services similar to the Services with any other vendor or supplier that competes with MW for the term of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual promises and provisions contained in this Agreement, the parties hereto mutually agree as follows:

A) **MW's Responsibilities**

In addition to its obligations set forth elsewhere in this Agreement, MW shall:

1) Give Members access to and provide assistance to them in utilizing the Services excluding however, all Member inquiries relating to membership billing, collections, credits or refunds for Service memberships.

2) Be responsible for producing, preparing and mailing all fulfillment materials and providing all membership services functions relating to the Services.

3) Submit to MHP for its review and approval, any and all printed MHP specific fulfillment materials to be distributed to Members prior to its dissemination. In the event MHP does not grant its approval of, or suggest changes to such material to MW in writing within five (5) business days of receipt of same by MHP, such submitted material shall be deemed approved for distribution by MW to Members.

4) Review any marketing materials, including but not limited to, scripts, collateral, promotional materials,

submitted by MHP to MW to ensure they accurately represent the Services and provide written approval of such materials within five (5) business days of receipt. MW will also review all advertising copy and communication used for TV, radio, print advertising, and electronic media such as the Internet, submitted by MHP and provide its written approval of such material within five (5) business days of receipt with the exception of marketing materials for California and Florida.

5) Instruct its membership service representatives to inform any Member who calls MW's toll free number with a non-Service related call, to call MHP's designated toll-free telephone number for assistance. MHP shall advise MW of the appropriate toll-free telephone number for Members to use.

6) Be responsible for answering all customer service related Service calls from Members, including, but not limited to, provider locator calls and product questions in a timely fashion consistent with membership service responsiveness for competitive services. MW acknowledges that it may, in the regular course of business, receive non-Service related calls from Members. If MW receives what it considers to be an excessive number of non-Service related calls from Members to the designated toll-free number, the Parties agree that the following process will occur:

(i) MW shall notify MHP of the receipt of excessive non-Service related calls from Members, and MHP will agree to conduct remote monitoring of Member calls with MW within five days of receipt of such notification by MW. Such remote monitoring will enable MHP and MW to jointly assess and mutually

agree upon whether the number of such non-Service related calls by Members is excessive.

(ii) Provided that upon the conclusion of the monitoring sessions described in Paragraph 6(i) above, MHP agrees that the number of non-Service related calls to MW are excessive, MHP and MW will develop a mutually agreeable action plan, with the objective to reduce the number of such non-Service related calls received by MW from Members; it being agreed, however, that the pricing on Attachment B includes full compensation to MW to handle such excess non-Service calls.

B. **MHP Responsibilities**

In addition to its obligations set forth elsewhere in this Agreement, MHP shall at its expense:

1) Be responsible, and will bear at its sole cost and expense, all marketing costs related to its acquiring Members.

2) Be responsible for responding to all membership billing, refund and credit transaction related questions and activities and assume all related costs.

3) Provide to MW, in a mutually agreeable electronic format, a computer readable file of all new and canceled Members along with other relevant membership data on a frequency to be mutually determined.

4) Submit to MW, for its timely review and written approval, all printed materials including, but not limited to, internal and external marketing material, scripts, collateral, promotional materials product manuals and training materials related to the marketing of Services to ensure an accurate portrayal of the Services.

5) MHP is precluded from marketing MW Services or benefits (either directly or indirectly through third party distributors) to credit card issuers, utility, telecommunications, cable and mortgage companies. Business entities having more than 1,000 members or employees other than those previously mentioned which may include, but not be limited to associations, trade groups and employer groups with more than 1,000 members or employees also cannot be marketed MW Services or benefits without the prior written approval by MW. In all events where MHP is offering Services under MHP's private label, MHP is free to determine the current retail market price of any Service purchased from MW. However, in the event that MHP desires to use MW's label for a Service, MHP cannot market to the organizations referred to above in this Paragraph 5 any of MW Services or benefits at a price point below the retail price at which MW decides to market its Services or benefits without advance written approval from MW.

With respect to those associations, trade groups and corporations and employer groups with more than 1,000 employees or members to whom MHP is authorized to market. MHP must notify MW of following specific information.

- Name of client
- Estimated number of members
- Method of distribution (remarketed to end user, multi-level marketer, give away etc.)
- Who is the end user

Upon receipt of the above information from MHP, MW will respond to MHP within 5 business days. MW may preclude

MHP from pursuing such client if MW has an existing membership benefits relationship or contact with the submitted client, but will reasonably grant its approval if no such relationship exists.

If MW provides its approval for MHP to proceed, MHP will have a 90 day period from the date of approval to secure a binding contract to supply MW Services or benefits to that client or to obtain an approval or endorsement to begin selling to such client or its member/employees. The 90 day period will be extended for an additional 30 days if prior to that time MHP provides MW with evidence indicating a strong likelihood that a binding contract will be executed within the next 30 days. In the event that MHP is selling Services as approved by MW to any of said groups, employers, associations, business entities or their members or employees, MW agrees to MHP's exclusive right to do so and agrees that it will not solicit, nor will approve any other third party with whom MW shall be dealing to solicit or attempt to sell any Services to said groups, associations, business entities or their members or employees.

6) Agree to pay MW the fees for which MHP commits to pay in Exhibit B hereto.

7) Be responsible for, and bear all expenses associated with establishing the initial processes and procedures for membership billing for Members who enroll in the Service.

8) Commit, on execution of this Agreement, to purchase a non-refundable minimum of 10,000 units of the Service described in Exhibit A during the first 18 months following the start date defined below, at the fees and in accordance with the terms appearing in Exhibit B to this Agreement. The start date is the date that all fulfillment

materials and services are readily available so that MHP can commence its business operations hereunder. The start date will be between April 1st and May 1st, 1998 and shall be evidenced by a confirming communication by MW to MHP.

C. **Confidentiality, Non Disclosure and Exclusivity**

"Confidential Information" shall mean lists, and pricing, quantities, payment terms, vendors and suppliers, marketing, membership and solicitation methods and materials and/or volume discounts, formulas, processes and methods, financial data, product development plans, marketing plans, strategies, techniques and methods, research data and similar information of the respective Parties that are valuable, special, unique and proprietary assets of the respective Parties. The Parties also agree that the Services and the aggregation of vendors, providers lists and the products and services bundled within it is, and will remain Confidential Information, and may not be used for any purpose other than as contemplated under this Agreement. As to MHP, "Confidential Information" includes all information and data regarding MHP's Members and customers, and the right to market and solicit the same for any purposes whatsoever.

Neither Party may disclose to a third party or appropriate to its own use, at any time during or subsequent to the term of this Agreement, any Confidential Information of the other which obligations of confidentiality and non-disclosure pursuant to this Agreement shall survive expiration and/or termination of this Agreement. More specifically, unless MW gives its prior written consent, MHP shall not reproduce in any form, release, or in any way make available or furnish, whether directly or indirectly, to any

person, firm, corporation, association, or organization at any time, any provider lists supplied by MW and/or information concerning any provider mentioned in any promotional mailings or materials or otherwise under this Agreement. Upon demand by MW and/or termination or non-renewal of this Agreement for any reason, MHP shall promptly deliver to MW all copies of any such provider lists and all lists and information relating to said providers that may be in its possession or under its control.

Moreover, MHP will not knowingly solicit or contact any providers through the use of any provider lists or other data provided by, or obtained from MW, unless MW has given its prior written approval. MW will not knowingly solicit or contact any of MHP's Members through the use of member lists or other data provided by or obtained from MHP or otherwise, unless MHP has given MW its prior written approval.

The obligations set forth in this paragraph shall not apply to any information furnished by either Party that is or becomes part of the public domain through no act of the disclosing party; is independently developed by a Party, or is or may be disclosed subsequent to the receipt thereof by the receiving Party or a third party not having a confidential relationship to the disclosing party with respect thereto.

Each Party agrees that unauthorized disclosure or use of Confidential Information will cause substantial and irreparable injury to the other Party, that monetary damages may not adequately compensate the injured Party for such injury and that the Party whose Confidential Information is wrongly disclosed is entitled to among other remedies that may be available at law, immediate

injunctive or other equitable relief for any breach of this Agreement in any court of competent jurisdiction.

Furthermore, for the term of this Agreement, MHP agrees to grant MW the exclusive, unlimited and restricted right to provide the Services to MHP customers and that it will not enter into any contract with MW's competitors, including companies involved in offering membership programs to consumers, to credit card issuers, cardholders and other organizations, to provide the Services as described in Exhibit A, to Members subject to the terms and conditions of this Agreement.

D. **Term and Termination**

This Agreement will be effective as of the execution date and shall remain in effect for a period of three (3) years and six (6) months from the contract start date as defined in Section B (8), page 4 of this Agreement. Thereafter, this Agreement will automatically renew for additional one (1) year terms until such time as written notice of an intent to terminate it is given by either party one hundred twenty (120) days prior to the expiration of the then current term. If at 120 days prior to the expiration of the then current term, MW remains in the business of operating or providing medical network service programs, said one year renewals shall be automatically granted, unless MW has determined in its sole discretion that it is not economically feasible to continue providing this type of service to MHP. In the event of termination, MHP agrees to pay all moneys owed to MW as of the effective date of termination, and MW agrees to continue to service all Members through the expiration of their current membership term. After termination, MW may not contact or solicit the Members, but shall assist MHP in the transfer

to MHP of all information and data concerning the Members at MHP's cost.

E. **Indemnification**

MHP agrees to indemnify and hold MW, its subsidiaries and affiliates and its respective directors, officers, agents, and employees harmless from and against any and all liability, actions, penalties, fines, claims, demands, suits, liens, losses, damages, costs and expenses, including, without limitation, reasonable attorney(s) fees on account thereof, caused by, arising out of, or in any way related to: (i) any act or omission of MHP related to its ability to grant the rights contracted for to MW; and/or (ii) for any breach of or any failure by MHP to comply and perform in accordance with the terms and conditions of this Agreement.

MW agrees to indemnify and hold MHP, its subsidiaries, affiliates and its respective directors, officers, agents, and employees harmless from and against any and all liability, actions, penalties, fines, claims, demands, suits, liens, losses, damages, costs and expenses, including, without limitation, reasonable attorney(s) fees on account thereof, caused by, arising out of, or in any way related to: (i) any act or omission of MW related to its performance under the terms of this Agreement; and/or (ii) any breach of or any failure by MW to comply with and perform to the terms and conditions of this Agreement.

F. **Intellectual Property**

MHP acknowledges MW's proprietary interest in and ownership of all intellectual property associated with marketing and membership materials contained in the Service, and otherwise associated with marketing the

Services, including, but not limited to copy, copyrights, tradenames, trademarks and servicemarks. Moreover, MHP agrees to obtain MW's written approval prior to printing and mailing any package containing MW's marketing and membership materials, incorporating the aggregation of bundled MW products and services which constitute the Service all of which constitutes Confidential Information as provided in Section C. above.

G. **Trademarks, Services Marks, Trade Names**

In the absence of specific prior written consent from the other Party, neither Party shall use any of the other's tradenames, servicemarks, brands or trademarks. It is expressly understood by each Party that tradenames, servicemarks, brands, and trademarks of the other are proprietary to the other Party and that nothing in this Agreement constitutes the grant of a license to use said tradenames, servicemarks, brands or trademarks. Upon termination of this Agreement, any and all rights or privileges of each Party to use the other's tradenames, servicemarks, brands or trademarks shall expire, and each Party shall discontinue the use of the other's tradenames, servicemarks, brands or trademarks in connection with any business conducted by it.

H. **Independent Contractors**

Neither Party is the employee, partner, joint venture agent or legal representative of the other Party for any purpose, nor shall either Party shall have the authority to enter into any contracts in the name of or on behalf of the other Party.

I. **Arbitration**

With the exception of seeking injunctive or other relief for violation of Confidential Information of a party pursuant to Section C above, any dispute arising of or relating to this Agreement, including any issues relating to arbitrability or the scope of this arbitration clause, will be finally settled by arbitration in the accordance with the rules of the American Arbitration Association and the United States Arbitration Act. and judgment upon the award rendered by the arbitrator(s) may be entered by any court with jurisdiction. The arbitration will be held in the Stamford, CT metropolitan area.

J. **Compliance with Laws**

During the term of this Agreement, MW agrees that it will use its best efforts to comply with all federal, state and local laws rules and regulations that are applicable for providing Services to the Members and for the ownership and operation of company owned and third party Medical Networks. In the event it becomes aware of any change in legislation or receives notice to cease and desist any Medical Network operation, it will notify MHP of that notice to cease and desist along with details of the statute or court order causing it to cease or limit materially its Medical Network operation.

K. This Agreement shall bind and inure to the benefit of the parties hereto and their successors and assigns.

L. **Notices**

All notices herein required or permitted shall be in writing, given by personal delivery or sent by registered or certified mail, postage prepaid, addressed as follows:

TO MW: MemberWorks Incorporated
680 Washington Blvd., Suite 1100
Stamford, CT 06901
Attn: Steven Levenherz
Senior Vice President

To MHP: Medsavers Health Program, Inc.
26 Borough Drive
West Hartford, CT 06117
Attn: Andrew Bronfman

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

MEMBERWORKS INCORPORATED

By: /s/ Steven Levenherz

Name: Steven Levenherz

Title: SVP

MEDSAVERS HEALTH PROGRAM, INC.

By: /s/ Andrew Bronfman

Name: Andrew Bronfman

Title: VICE PRESIDENT

By: /s/ Andrew D. Fineberg

Name: Andrew D. Fineberg

Title: President

**Attachments**
**Attachment A – Description of Services**
**Attachment B – Pricing**

[Attachments Omitted]

**AMENDMENT TO AGREEMENT**

THIS AMENDMENT ("Amendment") made this 15th day of April, 1999 between MEMBERWORKS INCORPORATED, with offices located at 9 West Broad Street, Stamford, Connecticut 06902, a Delaware corporation (hereinafter "MW") and MEDSAVER HEALTH PROGRAMS, INC., with offices at 26 Borough Drive, West Hartford, Connecticut 06117, a Delaware corporation (hereinafter "MHP").

**BACKGROUND**

MW and MHP have executed that certain Agreement dated February 9, 1998 (the "Agreement") pursuant to which, inter alia, MW agreed to supply certain membership service programs (the "Services") set forth in Attachment A hereto to MHP. MW and MHP now desire to amend the Agreement upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, for and in consideration of the mutual promises and provisions contained in this Amendment, the parties hereto mutually agree as follows:

1. MW represents that the Services and related fulfillment materials shall be available to MHP and its members not later than June 15, 1999 and thereafter continuously throughout the term of this Agreement. MW recognizes that MHP shall be pre-selling to prospective members for fulfillment on and after such date. As used herein, the term "New Start Date" shall mean October 15, 1999.

2. The term of the Agreement is hereby extended to, and shall end upon, the fourth (4th) year anniversary following the New Start Date. Thereafter, the Agreement shall renew in accordance with the terms and provisions of Paragraph D of the Agreement.

3. The last sentence of Paragraph B (8) of the Agreement shall be deleted, and wherever the term "start date" is used in the Agreement, the same shall be replaced and the term "New Start Date" shall be inserted.

4. The number "10,000" in Paragraph B (8) of the Agreement shall be deleted and the number "5,000" shall be substituted therefore.

5. Attachment B to the Agreement shall be deleted in its entirety and shall be replaced by the Attachment B annexed hereto, together with the accompanying Notes hereto. Said Attachment B sets forth the separate pricing for all States (including California and Florida for the Services on Attachment A.

6. MW shall provide MHP with information which may be of assistance to MHP in complying with California law, including Knox-Keene and the California Business laws prior to MHP initially marketing its product within the State of California. Notwithstanding the foregoing, any and all information or assistance that MW may provide to MHP with respect to California law is based on discussions with personnel within the State of California and/or California counsel for certain providers and may not reflect current conditions nor apply to MHP's intended marketing activities. MW assumes no liability for any information provided to MHP with respect to California law nor should MHP consider such information as legal advice nor should it be relied upon as reflective of California law. MHP intends to and will seek its own legal advice with respect to California law, including Knox Keene

and California business laws prior to MHP's initially marketing its product to California residents.

7. MHP shall have the right to sell dental and or other ancillary benefits separately from the physician/ facility benefits and vice versa.

8. Prior to MHP entering any State or region, MW shall notify and take all reasonable steps to cause the Network Providers (defined below) to provide notifications, in accordance with the terms of MW's contracts with the Network Providers, (the "Recognition Communications") to all participating service providers advising them of MHP's program and entry into their marketplace to the effect that such providers will recognize MHP's members and the discounts afforded to them. MHP has approved the form of a Recognition Communication for submission to Network 1 previously submitted to it by MW which Network 1 has mailed to its providers. MHP shall have the right to reasonably pre-approve changes to future Recognition Communications to Network 1 providers. Recognition Communications have been sent to the Network 1 providers in the States agreed to by the parties, which included NY, NJ, PA, IL and TX. Providers in Network 2 States, CT, MA, VA, MD, AZ, FL and the District of Columbia, will recognize MHP's members by their presenting a membership identification card containing its recognizable logo.

9. In addition to the fourth paragraph of Section B (5) of the Agreement, the following alternative procedure, at MHP's option, shall also apply on a case by case basis. The specific information requested in the bullets above will be submitted to MW by MHP as a notice, in the form of a letter from the association, trade group, corporation or employer group (each, a "Group") MHP has solicited for offering the Services, executed by an officer, employee or agent of such Group responsible

for obtaining and/or authorized to purchase Services (herein, a "Key Employee"), indicating a desire for MHP to proceed with a written proposal for marketing the Services. Such letter shall create the rebuttable presumption that MHP has the right under this Agreement to sell the Services to such Group. Upon receipt of such letter from MHP, MW will have ten (10) business days to present written evidence to MHP, confirming that MW has been actively negotiating or has an existing relationship with the Group or with a Key Employee of such Group for the purchase by such Group of MW's health savings program i.e. (a healthcare/medical and dental product including discounts on dentists, and physicians and hospitals) and that such negotiations or relationship between MW and such Key Employee and/or such Group is current and ongoing. A general solicitation for business by MW or a pre-existing relationship that is no longer active between MW and such Group shall not constitute a negotiation or relationship for purposes of this Section. In the event that MW presents such written evidence to MHP within the ten (10) business day period, MHP shall be precluded from pursuing such client. If no such negotiations or relationship exists; or if such written evidence is not presented within said ten (10) business day period however, MHP will be free to pursue the Group indicated in the letter. If MW submits such written evidence within said ten (10) business day period and MW does not have an existing contract with, or approval or endorsement to begin selling to the Group, MW will have a 120 day period from the date of its submitting such written evidence to MHP, to secure a binding contract to supply MW's healthcare/medical and dental discount product described above to that Group or to obtain an approval or endorsement to begin selling to such client or its member/employees. The 120 day period will be extended for an additional 90 days if prior to that time MW

provides MHP with evidence indicating a strong likelihood that a binding contract will be executed within the next 90 days or approval or an endorsement will be obtained from such Group to begin selling to such client or its member/employees. Following the expiration of said 120 day period, as the same maybe extended by said 90 day period without such a contract being executed, MHP shall be free to pursue said Group.

10. The fifth paragraph of Section B(5) of the Agreement will be deleted in its entirety and will be replaced with the following:

    If MW provider its approval for MHP to proceed or MHP is free to pursue such Group as set forth above, MHP will have 120 day period from the date of approval (or the date upon which MHP has the right to pursue such Group) to secure a binding contract to supply Services or benefits to that client or to obtain an approval or endorsement to begin selling to such client or its member/employees. The 120 day period will be extended for an additional 90 days if prior to that time MHP provides MW with evidence indicating a strong likelihood that a binding contract will be executed within the next 90 days or approval or an endorsement is obtained from such Group to begin selling to such client or its member/employees. In the event that MHP is selling Services as approved by MW to any of said Groups, employers, associations, business entities or their members or employees, MW agrees to MHP's exclusive right to do so and agrees that it will not solicit, nor will knowingly approve any other third party with whom MW shall be dealing to solicit or attempt to sell any Services to said Groups, associations, business entities or their members or employees.

11. The term "competitors" in the last paragraph of Section C of the Agreement, is defined as a PPO or any wholesaler of services that controls a PPO and does not include trade groups, or non-medical business associations, corporations, etc.

12. MW warrants, represents and covenants to and with MHP the following:

    A. MW has submitted to MHP true and correct, unmodified photocopies of the following agreements (each with its pricing terms redacted), which reflect the current sources of the physician, hospital and ancillary care networks to be delivered by MW to MHP and its members hereunder as provided in such agreements: (1) Agreement (the "Network 1 Agreement") dated November 5, 1997 between MW and United Network Ventures, LLC ("Network 1 Provider"); and (2) Agreement (the "Network 2 Agreement") dated December 29, 1998 between MW and Competitive Health, Inc. ("Network 2 Provider") [as used herein, the Network 1 Agreement and Network 2 Agreement are, together with their successors, collectively called the "Network Agreements"; the Network 1 Provider and Network 2 Provider are, together with their successors, collectively called the "Network Providers", the physician provider, hospital and ancillary care facility network supplied by Network 1 under the Network 1 Agreement is called "Network 1" and the physician provider network supplied by Network 2 under the Network 2 Agreement is called "Network 2", and Network 1 and Network 2 together with their successors are collectively called the "Networks")]; and upon the execution and delivery of the Network 2 Agreement, (which will be executed and delivered by MW upon the

execution and delivery by MHP of this Amendment to Agreement and Attachments thereto) the Network 1 Agreement and Network 2 Agreement shall be enforceable in accordance with their respective terms. MW shall take all reasonable steps to enforce the Network Agreements. MW shall deliver or make readily available to MHP, upon MW's receipt, all data and other information relating to MHP's Members' usage of the Networks, including data relating to number of times of access and savings received by MW from the Network Providers.

B. MW's review of the information supplied by its Network Providers indicates that on average 40% of Network 2 physicians have admitting privileges in Network 1 hospitals, with percentages in the following States and the District of Columbia being:

| State | Percentage |
|---|---|
| Arizona | 68% |
| Connecticut | 53% |
| Florida | 36% |
| Massachusetts | 19% |
| Maryland | 4% |
| Virginia | 29% |
| Wisconsin | 56% |
| Washington DC | 56% |

MHP acknowledges that MW's review of the admitting privilege relationships used in making the representation in this paragraph 12, was performed based on information supplied by its Network Providers from which the relationship between Network 2 and Network 1 hospitals was determined. However, MW has no reason to believe that any information set forth in this paragraph or

other information provided to it by Network Providers is either false or misleading.

C. Upon the execution and delivery of this Amendment hereof, MW will provide MHP with printouts (herein "printouts" of the following Network Providers/Networks:

1.) Physicians, hospitals and ancillary care facilities in Network 1
2.) Physicians in Network 2
3.) Dental providers
4.) Pharmacy and vision network locations
5.) Chiropractors
6.) Audiologists

Said printouts will reflect provider information by number of providers in each State within 3 digit zip codes. The dental network printout distinguishes general practitioners and specialists. Data in Items 1 through 6 above is based on information given to MW by its network providers, including Network Providers and, MW has no reason to believe any of such information is either false or misleading. Additionally, to those portions of the dental network which is proprietary to MW, MW represents and warrants the information contained therein is generally accurate as of the date indicated. As further confirmation that the Services will be available to MW and its Members not later than June 15, 1999, MW will request, but without obligation to obtain, from each of its Network Providers a representation that all providers and facilities in each of Network 1 and 2 are currently and properly contracted to provide discount medical services to MHP's members in accordance with the Agreement, as amended hereby, which provides for the following procedures: MHP's members

shall display their membership card to the provider at the point service is to be provided; the provider will recognize MHP's member as being part of Networks 1 and 2 by viewing the network's logo on the reverse side of the card; the provider will call the toll-free number listed on the reverse side of the card to confirm the program and to determine the discounted fee for Network 1 (and for Network 2, to only determine the discounted fee) that MHP's member is to be charged; the fee will be billed by the provider and paid by MHP's member at the point the service is provided; and

D. MW shall use commercially reasonable efforts to encourage its Network Providers to develop and maintain the provider counts, discounts and benefits of its participating provider services and to encourage its Network Providers to continually build a national physician and facility network which takes into consideration MHP's developing market needs. In any event, MW will use commercially reasonable efforts to ensure that the aggregate physician count is maintained at a minimum of 150,000. MW will encourage the Network 1 provider to maintain its acute care facilities/hospitals at a minimum of 2,100.

E. MW and MHP shall jointly agree on appropriate Network utilization, which shall include in any event the following: States in the Network 2 Network shall be: Connecticut, Massachusetts, District of Columbia, Virginia, Maryland, Florida and Arizona, and States in the Network 1 Network shall be: New York, New Jersey, Pennsylvania, Illinois and Texas. California will be included in Network 1, subject to statutory and regulatory compliance.

F. (i) Reference is made to the printout dated 3/24/99 entitled "Physicians Locations Count", which sets forth the physician counts by SCF code for the Network 1 states ("Existing Printout"). MHP has been informed that the information contained on such Printout reflects the status of Network 1's physicians as of September, 1998. According to MW, Network 1 has stated there have been no significant changes in its provider counts since September, 1998 and MW is currently de-duping additional provider information from Network 1, which when added to the information already set forth in the Existing Network 1 Printout, will make the information in such Printout current as of the date the same is delivered by MW to MHP. Upon execution of this Amendment, MW will request all further information from the Network 1 Provider necessary to prepare such new printout (the "New Printout") and MW will deliver the New Printout to MHP within four (4) weeks from the execution hereof. A similar New Printout for Network 2, together with computer discs showing, as in previously delivered discs, all doctors by type, location and state in each Network will be delivered within such four (4) week period as well. MW understands that time is of the essence for MW to deliver the updated information and to meet its obligations by the initial fulfillment date and, thereafter, the New Start Date.

(ii) In an effort to ensure that MHP will have sufficient provider counts to initially market its product, the parties have agreed that if any doctor counts in any "PCP Category" (defined below) within any SCF Code (set forth below) declines by more than the Permissible Percentage Decline (set forth below), then from and after June

15, 1999, and at MHP's option, and subject to subparagraph F(vi) herein, MW will substitute the Network 2 Provider Network for that State in lieu of the Network 1 Provider Network for that State, without additional charge; it being understood that Network 1 will continue with its hospital network for all the States. No substitution will occur in any State; however, until MHP commences marketing operations therein. A "PCP Category" shall mean either or any of the (1) Internal Med/General Prac, or (2) Obstetrics/Gynecology, or (3) Pediatrics categories set forth in the Existing Printout and New Printout.

| State | SCF Codes |
|---|---|
| CA | all listed SCF Codes |
| CO | 809 |
| GA | 300, 303 & 309 |
| IL | 600 to 608 inclusive, 611 |
| KS | 661, 662 & 666 |
| LA | 700 & 701 |
| NJ | all listed SCF Codes, except 084 |
| NY | 100 to 107 inclusive, 109 to 118 inclusive |
| OH | 440 to 445 inclusive |
| OK | 740 & 741 |
| OR | 970 to 972 inclusive |
| PA | 151, 152, 153, 189 to 194 inclusive |
| TN | 370, 372, 379 to 381 inclusive |
| TX | 750 to 752 inclusive, 754 to 762 inclusive, 767 to 770 inclusive, 773 to 778 inclusive, |

782 to 787 inclusive, 789 to 794 inclusive, 797 to 799 inclusive

(iii) For NY, if there is a doctor count range of 0 to 5 physicians in any PCP Category within a particular SFC Code as shown on the Existing Printout, then any loss shown on the New Printout for that PCP Category and SFC Code will result in MHP's option to substitute the Network 2 NY network for the Network 1 NY network.

(iv) Subject to subparagraph F (iii) above, if the Existing Printout's SCF Codes have the following range in doctor counts, then the Permissible Percentage Decline cannot exceed the percentage in the corresponding column opposite such SCF Doctor Count Range listing:

| SCF Doctor Count Range | Permissible Percentage Decline |
|---|---|
| 0 to 5 | 30% |
| 6 to 29 | 25% |
| 30 to 49 | 20% |
| 50 and above | 10% |

To illustrate, the Existing Printout shows a physician count of 138 in the Internal Med./General Prac PCP Category within the 113 SCF Code. If the New Printout shows a physician count of 95 in the same SCF Code and PCP Category, the decrease would be 43 doctors (that is, 138 less 95) and the percentage decrease would be 31% (that is, 43 divided by 138). Since the permissible percentage decline for this SCF Doctor Count Range (that is, 50 and above) is 10%, the 31% decline would he excessive and MHP would have the right to substitute the Network 2 network for the State of New York subject to subparagraph F(vi) herein.

(v) If the New Printout discloses an impermissible decline of doctor counts in a PCP Category within any urban or inner city SCF Code in either NY, CA or PA (herein called the "Declining SCF Code"), and provided that: (i.) there exist other SCF Codes "contiguous" to such Declining SCF Code which have not, themselves, suffered an impermissible decline, and (ii.) it is reasonably determined that there exists at least the same number of doctors as originally existed in the Declining SCF Code (as shown on the Existing Printout) in the affected PCP Category in both the Declining SCF Code and "contiguous" SCF Code to adequately service MHP's members, such that MHP's members would not have to travel from the Declining SCF Code to the "contiguous" SCF Code by bus, subway or automobile (whatever is most customary for such area) for more than 15 minutes to access any of the doctors in the affected PCP Category, then no substitution of Networks will take place by reason of the decline in such Declining SCF Code. As used herein, "contiguous" shall mean that the SCF Code areas in question are in the same State, share a common geographic boundary and are not separated either physically (i.e., by bridges, tunnels, bodies of water or the like) or culturally (i.e., by different social, ethnic, religious or cultural backgrounds such that it would be unreasonable to expect a Member in the Declining SCF Code to willingly and comfortably use a doctor in the "contiguous" SCF Code.) This subparagraph F(v) shall not apply (i.) in NY where the Existing Printout shows doctor count ranges of 0-5 in any PCP Category within any SCF Code, or (ii.) to any Declining SCF Code where the Existing Printout shows doctor counts in any PCP Category within any SCF Code of 100 or greater.

If no substitution of networks results due to the application of this subparagraph F(v), MW will commence using commercially reasonably efforts to encourage the Network Provider to build up the doctor counts in such Declining SCF Code to levels equal to or exceeding the counts shown in the Existing Printout.

(vi) Following the receipt of the New Printout, the parties shall diligently and expeditiously use the above procedures to determine which Networks are to provide doctors in which States as of the New Start Date. Subject to the terms and provisions of this Amendment, no further substitutions of Network 2 for Network 1 States will thereafter occur, unless any doctor count in any "PCP Category" within any SCF Code thereafter during the term hereof declines by more than the Permissible Percentage Decline. In such a case, MW shall promptly contact the Network Provider and encourage it to build its doctor counts to levels equal to or exceeding those originally shown on the Exiting Printout, and if the doctor counts do not rise to such levels following a ninety (90) day period, at MHP's option, MW will substitute the Network 2 Provider Network for that State in lieu of the Network 1 Provider Network for that State, without additional charge; it being understood that Network 1 will continue with its hospital network for all the States.

13. MHP shall have the right to use the names of network hospitals, clinics and facilities in its advertisements and promotional materials, subject to the prior reasonable approval of the Network Provider and the above institutions.

14. MW shall handle MHP's customer requests for termination, refunds and complaints (whether received by inbound telephone call or otherwise) utilizing MW's customary "save methods" as modified for MHP's business and as approved by MHP).

15. MW shall provide MHP with creative and printing services for 25,000 general marketing brochures and 10,000 California marketing brochures at no charge, meeting MHP's reasonable requirements. Resultant mechanicals and computer-generated layouts will become MHP's property.

16. MW shall make a one time payment of $20,000 to MHP within 5 business days after execution of this Amendment.

17. For purposes of the Agreement, wherever the term "Members and their immediate family" appears such term will be defined as either: i) family members, i.e. husband, wife, partner and children living in a common household or ii) children from the common household up to 24 years of age living out of the home but attending school on a full-time basis.

18. MW will have at least two (2) bilingual i.e. (Spanish/English speaking) membership services representatives available to respond to Spanish speaking Members during ordinary business hours CST (8:00 a.m. through 8:00 p.m.).

19. In consideration of entering into this Amendment, each party hereby releases and forever discharges the other from and against any and all claims, damages, losses and expenses arising under or in connection with the Agreement prior to the execution of this Amendment, including, but not limited to, those attributable to the delay in the "start date" (as originally set forth in the Agreement) being delayed beyond May 1, 1998. Nothing set forth in this Paragraph, however,

shall excuse, reduce or impair the obligations, duties and responsibilities each party hereto has undertaken to perform under the Agreement, as hereby amended. MHP's release and discharge of MW hereunder is subject to its receipt of the payment set forth in Section 16 above.

20. MW will offer MHP the opportunity to utilize providers in new network provider networks on a non-exclusive basis that MW contracts with or utilizes. MW will notify MHP when such new networks are contracted with. If the cost to MW of these new networks is greater than the cost to MW of Network 1 or Network 2 for the States then servicing MHP's members, then MHP shall be charged the new network rates notwithstanding the last sentence of the last paragraph of the Notes to Attachment B. The foregoing does not apply to substitutions or expansions of the present Networks necessary or desirable to provide the Services to MHP and its Members, which shall occur without increased pricing.

21. MHP's salesmen shall have the right to take printouts contained in discs, indicating for the Networks, the number of providers in each State with three (3) digit zip codes, as the same shall be updated, on sales calls to show prospective clients and members.

22. Except as amended hereby, the Agreement shall remain unchanged, the terms and provisions of which are ratified and confirmed in all respects. If the terms of this Amendment and the Agreement conflict, the terms of this Amendment shall control.

IN WITNESS WHEREOF, the parties have executed this Amendment as of the day and year first above written.

**MEMBERWORKS INCORPORATED**

By: /s/ Steven H. Levenherz
Steven H. Levenherz
Senior Vice President

**MEDSAVER HEALTH PROGRAMS, INC.**

By: /s/ Andrew I. Bronfman
Vice President and
Chairman

By: /s/ Andrew D. Fineberg
Andrew D. Fineberg
President and
Director

(2)

No. 05-117

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In The

# Supreme Court of the United States

VERTRUE INCORPORATED
(F/K/A MEMBERWORKS INCORPORATED),

*Petitioner,*

v.

MEDVALUSA HEALTH PROGRAMS, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Connecticut Supreme Court**

## BRIEF FOR RESPONDENT IN OPPOSITION

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SEPTEMBER 16, 2005

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## QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly rejected Petitioner's claim for review under the Fourteenth Amendment of a private, consensual arbitration award of punitive damages and concluded that, instead, review is to be conducted under well established standards of review applicable to private arbitration awards?

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent is not owned in whole or in part by any publicly traded company.

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## STATEMENT

1. This case involves an award of punitive damages resulting from an arbitration clause agreed to by two businesses to resolve disputes arising from their business relationship. Pet. App. 92a, 103a. The arbitration clause was included in the February 9, 1998 agreement between Respondent MedValUSA Health Programs, Inc. (formerly Medsaver Health Programs, Inc.) and Petitioner Vertrue Incorporated (formerly MemberWorks Incorporated).[1] The arbitration clause provided: "[A]ny dispute arising [out] of or relating to this Agreement, including any issues relating to arbitrability or the scope of this arbitration clause, will be finally settled by arbitration in the (sic) accordance with the rules of the American Arbitration Association and the United States Arbitration Act[,] and judgment upon the award rendered by the arbitrator(s) may be entered by any court with jurisdiction." Pet. App. 103a. The clause contained only one restriction, which excepted from arbitration any remedy for violations of the Agreement's confidentiality clause. *Id.* The Agreement was amended on April 15, 1999, but the arbitration clause remained unchanged and, along with the other unchanged terms of the Agreement, was "ratified and confirmed" by the amendment. *Id.* at 105a, 120a.

On September 13, 2000, Respondent filed a three count arbitration demand with the American Arbitration Association (AAA) alleging that Petitioner engaged in a deliberate and wrongful course of conduct which constituted, among other things, unfair and deceptive behavior in violation of the Connecticut Unfair Trade Practices Act (CUTPA). Conn. Gen. Stat. §§42-110b *et seq.*; Appendix to Brief of Plaintiff-Appellee MedValUSA Health Programs,

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[1] Respondent is a start up company whose business plan was to sell discount health care programs; Petitioner is an established provider of discount product and services programs. *See* Pet. 3.

Inc. at A1-A20, *MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423 (Conn. 2005) (No. 17117) (MedValUSA Conn. S. Ct. App.). Respondent's CUTPA claim alleged that Petitioner's "actions . . . were immoral, unethical, oppressive and unscrupulous;" that Petitioner's "obstruction of [Respondent's] business plan for purposes of promoting its own business interests violates public policy" in light of Petitioner's contractual obligations to Respondent; and that Petitioner's actions "constitute unfair and deceptive trade practices within the meaning of General Statutes §42-110b *et seq.*, as a result of which [Respondent] has suffered an ascertainable loss." MedValUSA Conn. S. Ct. App. A19. Punitive damages are allowed under CUTPA, and Respondent explicity sought such damages in its request for relief. Pet. App. 85a-86a; MedValUSA Conn. S. Ct. App. A20.

The parties voluntarily entered into arbitration pursuant to their agreed upon arbitration clause, beginning with their joint selection of three experienced business attorneys to serve as arbitrators. MedValUSA Conn. S. Ct. App. A74, n. 1. Over the course of ten months, the three arbitrators presided over eighteen days of hearings and reviewed extensive post-hearing submissions: "the parties engaged in opening and closing statements, submitted approximately 600 exhibits, presented testimony from ten witnesses, generated a transcript of 3,321 pages, and submitted posthearing briefs, reply briefs, supplemental briefs and detailed time lines exceeding 250 pages of discussion, analysis and argument." Pet. App. 58a. Respondent pursued its CUTPA claim, for which it explicitly sought punitive damages, in briefs and arguments to the arbitrators. MedValUSA Conn. S. Ct. App. A20-25, A33-35, A45, A49-51, A63-66. Petitioner acknowledged that Respondent sought attorneys' fees and punitive damages under CUTPA, *id.* at A59-62, A72, and did not argue that the punitive damages sought were limited by contract, statute, or state or federal constitutional law. Instead,

Petitioner urged the arbitrators to reject Respondent's claim entirely. *E.g., id.* at A26-32, A52-54, A67-71.

The three arbitrators issued their written award on December 12, 2002, finding Petitioner liable to Respondent on all counts of the arbitration demand. Pet. App. 79a-83a. On the CUTPA claim, the arbitrators found that Petitioner's conduct was "unfair and deceptive," and listed a series of acts "illustrative of [Petitioner's] unfair and deceptive behavior." *Id.* at 79a-81a. For this misconduct, the arbitrators awarded Respondent five million dollars in punitive damages, and also awarded attorneys' fees and costs, as well as arbitration fees and expenses totaling $458,744.44. *Id.* at 82a. The arbitrators did not award compensatory damages to Respondent, concluding that Respondent had not established such damages with "reasonable certainty" under the stringent Connecticut law requirement for recovery of lost profits by nascent businesses like Respondent. *Beverly Hills Concepts v. Schatz and Schatz, Ribicoff and Kotkin*, 717 A.2d 724 (1998); Pet. App. 79a; *see supra*, n. 1. The arbitrators' finding of liability necessarily rested on a determination, however, that Respondent had suffered an ascertainable loss; such a loss is a statutory prerequisite for awarding punitive damages under CUTPA. Pet. App. 79a, 85a; *see* MedValUSA Conn. S. Ct. App. A19.

2. Respondent moved on December 18, 2002 to confirm the arbitrators' award in Connecticut Superior Court (superior court). *See* Pet. App. 88a-89a. Petitioner chose not to pay the award, and instead opposed the motion to confirm and filed a motion to vacate. Pet. 6.

Petitioner's motion to vacate asserted that: (1) the arbitration award violated a state public policy against excessive punitive damages awards, which Petitioner claimed is embodied in the due process clause of the Fourteenth Amendment, U.S. Const. amend. XIV §1; (2) the arbitration award violated a state public policy against

awarding punitive damages under CUTPA in the absence of reckless, intentional or wanton conduct; and (3) the amount of the punitive damages awarded was excessive and evidenced a manifest disregard or an egregious or patently irrational application of the law in violation of Connecticut General Statutes Section 52-418(a)(4). Pet. App. 58a-59a. Petitioner's challenges all were framed in terms of state law, including its citation to the Fourteenth Amendment as a source for finding a purported state public policy against excessive punitive damages. *See id.* Petitioner did not claim that the Agreement's arbitration clause was invalid or restricted, that the demand's claim for punitive damages was prohibited, or that the arbitrators were not authorized to award punitive damages. *See id.*

The superior court denied Petitioner's motion to vacate, and granted Respondent's motion to confirm the arbitration award. *Id.* at 78a. As to Petitioner's first claim, that the arbitration award violated a state public policy against excessive punitive damages embodied in the Fourteenth Amendment and *BMW of North America v. Gore*, 517 U.S. 559 (1996), Pet. App. 58a, 63a, the court reasoned that the private, consensual arbitration between the businesses did not involve state action, so "the award is not subject to due process scrutiny." Pet. App. 66a. As to Petitioner's second claim, that the arbitration award violated public policy under CUTPA because it was not based on reckless, intentional or wanton conduct, *id.* at 58a, the superior court found that the written award from the three arbitrators was "replete with evidence [revealing] a reckless indifference to the rights of others or an intentional and wanton violation of those rights." *Id.* at 70a-71a (quotation omitted). The court then turned to Petitioner's third claim which, like the first, was that the amount of the arbitration award was excessive. *Id.* at 58a-59a, 73a ("[Petitioner] argues that the amount of the punitive damage award is so excessive" as to manifest